EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

NO. 1861

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. W. ROBINSON, as Assignee of a Certain Judgment Entered in the Circuit Court of the United States for the Western District of Washington, Northern Division, in the Cause Entitled HANNAH O'CALLAGHAN and EDWARD CORCORAN, Complainants, vs. TERRENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU, Defendants,

Appellant,

vs.

W. F. HAYS and W. M. RUSSELL,

Appellees.

In the Matter of the Establishment of a Certain Lien Claim of W. F. HAYS, etc.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON STREET, S. F., CAL.

Records of U.S. Circuit
Court of Appeals
619

No. 1861

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In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Appellants,

vs.

HANNAH O'CALLAGHAN and EDWARD CORCORAN,

Appellees.

[Names and Addresses of] Counsel.

J. W. ROBINSON, Esquire, Lowman Building, Seattle, Wash.

J. J. GODFREY, Esquire, Lowman Building, Seattle, Wash.

J. J. McCAFFERTY, Lowman Building, Seattle, Wash.

C. A. REYNOLDS, Esquire, Pioneer Building, Seattle, Wash.

HARRY BALLINGER, Esquire, Pioneer Building, Seattle, Wash.

C. T. HUTSON, Esquire, Pioneer Building, Seattle, Wash.

W. F. HAYS, Esquire, American Bank Building, Seattle, Wash.,

In Propria Persona.

In the Circuit Court of the United States for the Western District of Washington, Northern Division, at Seattle.

No. 943.

HANNAH O'CALLAGHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU,

Defendants.

Judgment.

This cause having been regularly instituted in the above-entitled court, brought on for hearing and heard upon the pleadings and evidence, and a decree entered hereon on July 21, 1902, in favor of the complainants and against the respondents and Marie Carrau, one of the respondents, having appealed from said decree to the Circuit Court of Appeals for the Ninth Circuit, and said Circuit Court of Appeals having on September 12, 1903, rendered its decision herein, reversing the decree and judgment of the Circuit Court, and directing that the action be dismissed at complainants' costs and the complainants having appealed from the decision of the United States Circuit Court of Appeals for the Ninth Circuit, to the Supreme Court of the United States, and having also petitioned said Court for a writ of certiorari, and said appeal having been per-

fected and upon motion of Marie Carrau dismissed, for the reason that the decision of the Circuit Court of Appeals was final and the petition for a writ of certiorari having been granted and the record of appeal having been considered by the Supreme Court of the United States, as a return to the writ, and the Supreme Court of the United States having on May 29, 1905, rendered its decision by which the decision of the United States Circuit Court of Appeals was affirmed, with costs, and the mandate having been received from the Supreme Court of the United States, directing the dismissal of this action for want of jurisdiction, and comes J. W. Robinson, one of the solicitors for Marie Carrau, and asks for judgment, and notice having been heretofore given the said complainants of the application at this time to this Court for a judgment in accordance with said mandate, and the Court being advised,—

IT IS NOW ORDERED, ADJUDGED AND DECREED, that this action be and the same is hereby dismissed at complainants' costs; and it is further,

ORDERED AND ADJUDGED, that Marie Carrau do have and recover of and from C. H. Farrell, as the administrator of the estate of said Hannah O'Callaghan, deceased, and Edward Corcoran, and each of them, complainants herein, her costs and disbursements in this suit sustained, to be taxed by the clerk of this Court.

Done in open court, at Seattle, Washington, August 7, 1905.

C. H. HANFORD,
Judge.

Charles M. Farrell, as Admr., and Edward Corcoran, except to foregoing and said exception is allowed.

Aug. 7th, 1905.

_____,

Judge.

[Endorsed]: Judgment. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 7. 1905. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

[Assignment of Judgment.]

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

IN EQUITY.

No. 943.

HANNAH O'CALLAGHAN (C. H. FARRELL, Substituted as One of the Complainants Therein, Administrator of the Estate of HANNAH O'CALLAGHAN, Deceased), and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU,

Defendants.

Know all Men by These Presents: That for a valuable consideration, the receipt of which is hereby acknowledged, Marie Carrau, one of the defend-

ants in the foregoing entitled action hereby assigns, transfers and sets over unto J. W. Robinson of Olympia, Washington, that certain judgment entered herein in her favor on August 7th, 1905, by the Judge of the above-entitled court against the said Edward Corcoran and the said C. H. Farrell, as administrator of the estate of Hannah O'Callaghan, deceased, for the sum of $2619.90, subject to whatever payments may have been made thereon or thereunder by the United States Fidelity & Guaranty Company under its cost-bond filed in the above-entitled action, based upon which cost bond, suit was instituted in the Superior Court against said United States Fidelity & Guaranty Company, and judgment secured for the sum of $400.00, with interests and costs of the Superior and Supreme Courts of the State of Washington, and I hereby authorize and empower the said Robinson, the assignee of the judgment aforesaid entered in the foregoing action, to take whatever action he may lawfully do under the law to collect said judgment, with interest, costs, etc.

IN WITNESS WHEREOF I have hereunto set my hand this March 16th, 1908, at Seattle, Washington.

MARIE CARRAU,
Judgment Creditor.

[Endorsed]: Assignment of Judgment. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 26, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

United States Circuit Court, Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAGHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Defendants.

Memorandum Decision on Question as to the Validity of Lien Claimed by W. F. Hays.

Filed Jul. 6, 1909.

The question to be decided is whether Mr. Hayes, one of the attorneys for Marie Carrau, has a lien on a judgment in her favor for costs.

I find from the evidence that Hayes and Miss Carrau entered into a contract in writing whereby he was engaged as her attorney to conduct the litigation in her behalf, and that in the progress of the proceedings he disbursed several hundred dollars of his own money in payment of necessary expenses of the litigation, the exact amount of which cannot be ascertained from the evidence. After other attorneys had come into the case, with apparent acquiescence on the part of Hays, Miss Carrau attempted to dismiss him from the case without compensating him. This she could not do legally without an order of the Court for cause. There being need for additional funds, W. M. Russell made

a loan of $425.00, repayment of which was guaranteed by Hayes. Russell also loaned other money which was used in payment of the expenses of the litigation amounting to the total sum of $1500.00, including the loan of $425.00 guaranteed by Hayes, for all of which Miss Carrau agreed that he should be reimbursed from any fruits of the litigation, and to secure repayment out of the money to be collected in satisfaction of the judgment for costs, Russell made an assignment of his claim to Hayes.

Miss Carrau assigned the judgment to J. W. Robinson, one of her attorneys, under an agreement, that he should use the money when collected in paying her debts incurred in the litigation, including the money due to Russell.

It is the opinion of the Court that the assignment to Robinson is not a bar to the assertion by Hayes of his right to a lien for services and the amount of money disbursed by him for the benefit of his client, but he is not entitled to absorb the entire fund to the exclusion of his associated and Russell.

To reach an equitable adjustment, the Court directs that Robinson shall have a right to control proceedings for collecting the judgment, as under the statute, if any execution is necessary, it must be issued in his name. The money when collected shall be applied to repayment of the amount actually loaned by Russell, with accrued interest as provided in the two written contracts signed by Marie Carrau, dated respectively April 7, 1902, and April 19, 1902, and the surplus, if any, to be divided equally between Hayes and Robinson.

There will be deducted from the share of Hayes the amount necessary to pay taxable costs in the irregular proceeding for which he is responsible.

C. H. HANFORD,
Judge.

[Endorsed]: Memorandum Decision of Question as to Validity of Lien Claimed by W. F. Hays. Filed U. S. Circuit Court, Western District of Washington. Jul. 6, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Petition of J. W. Robinson for Adjustment of the Matter of the Distribution of Fund, etc.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAGHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Respondents.

Comes now J. W. Robinson, the assignee of the judgment for costs herein, and based upon information and belief, and as well the verification of Marie Carrau, alleges the facts to be:

1st. That judgment was entered herein, as shown by the records, in favor of Marie Carrau for plus Two Thousand Six Hundred Dollars, as shown by the judgment herein for costs to which reference is

hereby made, and that prior to the entry of said judgment for costs the complainants had filed in this Court a bond for costs in the sum of Four Hundred Dollars, and which secured a portion of said judgment for costs, and which bond was sued upon in the State Court and judgment had, which was thereafter paid, as shown by the files and records in this cause, and which amount was credited on said judgment as having been received by Marie Carrau, and that the amount collected, less certain costs and expenses, was turned over and applied to the indebtedness of Marie Carrau to W. M. Russell for moneys advanced to carry on this litigation on the part of Marie Carrau, and that this is the same W. M. Russell who is mentioned in the memorandum decision on the question as to validity of lien claim by W. F. Hays rendered by this Honorable Court herein, to which reference is hereby made and the same made a part of this petition, and that in connection with the appeal from the United States Circuit Court of Appeals to the Supreme Court of the United States, J. W. Robinson, one of the solicitors for Marie Carrau, advanced the docket fee and costs necessary to protect respondents' rights on said appeal, and upon said appeal being determined by the Supreme Court of the United States, an attorneys' fee was allowed as part of the costs, which was received by W. F. Hays, who claimed the right to collect such solicitors' fees, but which it is here alleged he had no right or authority to collect.

2nd. That in order for Marie Carrau to carry on said litigation herein and on appeal to the Circuit Court of Appeals for the Ninth Circuit and in the

Supreme Court of the United States, it was necessary for her to secure certain moneys from her friends for that purpose, and that during this period under similar agreements to that mentioned in said memorandum decision by this Honorable Court between W. F. Hays and said Marie Carrau, the hereinafter named persons advanced the hereinafter specified amounts to the said Marie Carrau, which was expended by her in the various items of costs, etc., necessary in conducting said litigation and in defending her rights herein, and the persons hereinafter named furnished the amounts set opposite their names for that purpose, and there is no difference or distinction between the amounts hereinafter mentioned and the purpose for which the same was advanced to the said Marie Carrau than the funds mentioned with reference to which the said Hays claimed a lien against said judgment, to wit:

Edward Cheasty, for transcript, etc., on appeal, between August 1, 1902, and January 30, 1903	$1,000.
August, 1902, J. A. Bailargeon, for same, etc.	500.00
December, 1902, Henry Varian, for same, etc.	500.00
January, 1903, Jack Barberis, expenses, etc.	600.00
January, 1903, R. J. Ferguson, expenses, etc.	500.00
August 1st, 1902, to August 1st, 1904, J. W. Robinson, expenses, etc	1,325.00
May, 1904, R. J. Ferguson, expenses, etc	450.00
B. E. Prentice, expenses, etc	300.00

March, 1903, Ole Anderson, expenses, etc.. 75.00
January, 1903, Miss Julia Ekson, expenses, etc. 350.00

All of which were from time to time advanced to the said Marie Carrau under agreements to be repaid out of the fruits of such litigation, if any there should be.

3rd. That after crediting said judgment with the amount of costs realized under said bond for security for costs and by reason of the memorandum decision herein mentioned, J. W. Robinson caused execution to issue herein against the property of O'Callaghan, et al., and that responsive thereto the complainants herein caused to be paid to the United States Marshal in full satisfaction of said execution, together with costs, the sum of Two Thousand Eight Hundred Ninety-one and 50/100 Dollars, ($2,891.50), and your petitioner respectfully submits that as the assignee of said judgment and the stakeholder of said funds he desires that this Honorable Court shall adjust the matter of the distribution of this fund and to determine to whom and in what amount the same shall be distributed, and your petitioner also desires to call the Court's attention to the fact that a portion of this judgment is for witness fees, as shown by the cost bill herein, and that proper provision should be made for the payment of such witnesses the amounts therein allowed, and that the matter shall be equitably adjusted between all the parties who advanced these various sums, and that this Honorable Court enter an order directing your petitioner to distribute said moneys so acquired as may respond to equity and the rights of the various par-

ties hereto, and that there being insufficient money to reimburse the parties who have advanced these amounts, that an order be entered directing the same to be paid pro rata in accordance with the amounts advanced, and for any other relief to which your petitioner and assignee of said judgment may be entitled.

J. W. ROBINSON,
Petitioner and Assignee of said Judgment.

State of Washington,
County of King,—ss.

Marie Carrau, being sworn, says that she has heard read the foregoing petition of J. W. Robinson, assignee of said judgment and the petitioner herein, knows the contents thereof and believes the same to be true.

MARIE CARRAU.

Subscribed and sworn to before me this 15th day of December, 1909.

JAMES J. McCAFFERTY,
Notary Public in and for the State of Washington.
Residing at Seattle.

[Endorsed]: Petition. Filed U. S. Circuit Court, Western District of Washington. Dec. 17, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Motion to Strike Petition of J. W. Robinson and Notice Thereof.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAGHAN and EDWARD CORCORAN,

Plaintiffs,

vs.

TERENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Defendants.

Comes now Wm. F. Hays, formerly attorney for the defendant, Marie Carrau, and moves this Honorable Court to strike the petition of J. W. Robinson, heretofore filed herein, in which said Robinson asks that an order be entered apportioning out among divers persons the proceeds of the judgment for costs in said action.

This motion to strike the aforesaid petition is made for the reason and upon the ground that this Honorable Court on the 6th day of July, 1909, duly entered its written order distinctly decreeing how said fund shall be distributed, and, therefore, the petition of the said Robinson is unauthorized in law.

WM. F. HAYS,
In Propria Persona.

To J. W. Robinson, Esq.

Take notice that the undersigned will on Monday, December 27, 1909, at 10:00 o'clock A. M., of said

day, on the coming in of Court, or as soon thereafter as counsel can be heard, call up the foregoing motion.

WM. F. HAYS.

Service of the within Motion this 22d day of December, 1909, is hereby admitted.

[Endorsed]: Motion to Strike Petition of J. W. Robinson. Filed U. S. Circuit Court, Western District of Washington. Dec. 23, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Motion of J. W. Robinson for Reconsideration of Decision on Question of Validity of Lien Claim of W. F. Hays, and Notice Thereof.]

In the Circuit Court of the United States, Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN,

Complainants,

vs.

TERRENCE O'BRIEN et al.,

Respondents.

Comes now J. W. Robinson, the assignee of the judgment for costs herein, and as one of the solicitors for Marie Carrau herein and for and on behalf of the various parties named in the petition filed herein, December 16, 1909, and respectfully moves the Court for a reconsideration of the decision rendered herein by the Honorable C. H. Hanford, Judge, as shown by his Memorandum Decision on Question as to Validity of Lien Claim by W. F.

Hays, and in connection with said petition so as aforesaid filed herein and for the reasons contained in said petition, which is here referred to and made a part hereof, and because in the testimony taken before said Court it was shown that other persons, referring to the persons in said petition set forth, had advanced money to said Marie Carrau under similar conditions and for the same purpose and with a similar understanding and agreement as that referred to in the Memorandum Decision as to Russell and Hays, and for the reason that said fund is a trust fund which equitably belongs to the various parties who advanced the money necessary to carry on the litigation in behalf of Marie Carrau, and which resulted in the securing of said judgment for costs.

J. W. ROBINSON,
Assignee, Solicitor, etc.

To W. F. Hays and W. M. Russell:

You and each of you will hereby take notice that the foregoing motion will be called on for hearing before the Honorable C. H. Hanford, one of the Judges of said Court, at ten o'clock A. M., January 24, 1910, or as soon thereafter as the same can be heard, and that such motion will be presented in connection with a petition filed herein and the motion to strike such petition filed herein, and for hearing on said date.

J. W. ROBINSON,
Assignee, Solicitor, etc.

Service of the foregoing motion and notice admitted and receipt of copy thereof acknowledged this 21st day of January, 1910.

W. F. HAYS.

Service of the within Notice and Motion to reconsider by delivery of a copy to the undersigned is hereby acknowledged this 21st day of January, 1910.

R. H. LINDSAY,
Attorney for Wm. M. Russell.

[Endorsed]: Notice and Motion to Reconsider Memorandum Decision. Filed U. S. Circuit Court, Western District of Washington. Jan. 21, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order Denying Petition to Reconsider and Directing Distribution of Moneys.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAGHAN, et al.,
Complainants,
vs.
TERRENCE O'BRIEN et al.,
Respondents.

ORDER DISTRIBUTING COSTS.

This cause coming on this 24th day of January, 1910, regularly for final hearing upon the petition of J. W. Robinson, on his own behalf and as attorney for the respondent, Marie Carrau, for a "reconsideration" of the decision made and filed herein on the 6th day of July, 1909, relating to the lien of W. F. Hays upon the judgment for costs; the petitioners, said Carrau and Robinson, having duly noted said

cause for hearing this day, and upon the notice and brief filed herein in support of said petition by the said Robinson on his own behalf and on the behalf of the said Marie Carrau, as her attorney, and the said Hays appearing in propria persona, and the Court having fully considered said petition and the brief of the said Robinson and being in all things fully advised,—

It is now ordered and adjudged that said petition to "reconsider" be, and the same is hereby denied, and the Clerk of this Court is hereby directed to distribute and pay over to the parties, or their attorney, the moneys derived under execution for costs herein now in the Registry of this Court, in accordance with the terms and provisions of the decision of this Court filed herein on the 6th day of July, 1909. Said clerk, however, to retain therefrom the sum total taxed as witness fees, said witness fees to be paid by said clerk only upon proper receipt therefor being filed with said clerk or entry upon the execution docket in said court.

C. H. HANFORD,
Judge.

[Notice of Application for Order Denying Petition to Reconsider, etc.]

To Marie Carrau and to J. W. Robinson, her Attorney, and to the Petitioner, J. W. Robinson:

Take notice, that W. F. Hays, named and referred to in your petition heretofore filed herein on December 16, 1909, will apply to the above-entitled Court on his own behalf and as attorney for W. M. Russell, Assignee, at ten o'clock A. M., January 25, 1910.

or as soon thereafter as counsel can be heard, to have signed and entered the above and foregoing order.

January 24, 1910.

W. F. HAYS.

Service of the within Order this 24th day of January, 1910, is hereby admitted.

McCAFFERTY, ROBINSON & GODFREY.

[Endorsed]: Order Distributing Costs. Filed U. S. Circuit Court, Western District of Washington. Jan. 24, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,

Complainants,

vs.

TERRENCE O'BRIEN et al.,

Respondents.

Motion [for Show-cause Order Against W. M. Russell and W. F. Hays].

Comes now J. W. Robinson, as assignee of the judgment herein, and solicitor for respondents and for the parties named in the petition with reference to a distribution of funds created by the collection of the judgment, and moves the Court for a show-cause order against W. M. Russell and W. F. Hays, to show cause before this Honorable Court on a date to be fixed, why they should not return and repay to

the clerk of this Court the moneys withdrawn herein from the registry of the Court, as shown by the files and records herein and the affidavit attached hereto.

J. W. ROBINSON,
Assignee and Solicitor for Parties Named.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Respondents.

Affidavit of J. W. Robinson [in Support of Motion for Show-cause Order].

United States of America,
State of Washington,
County of King,—ss.

J. W. Robinson, being duly sworn upon his oath, deposes and says, that judgment for costs was entered herein in favor of Marie Carrau, and thereafter duly assigned to this affiant in trust and for the benefit of the persons named in the petition filed herein on the 16th day of December, 1909, and affiant here refers to said petition and also to the lien claim filed herein by W. F. Hays, and to the Memorandum Decision on question as to validity of lien claimed by W. F. Hays, rendered herein by the Honorable C. H. Hanford, on July 6, 1909, and also to the order

distributing costs filed herein January 25, 1910, and to all the records and files herein since the filing and entry of said judgment for costs and all the files and records relating to said judgment, its assignment and the orders, petitions, motions with reference thereto, including the motion filed herein on January 22, 1910, for a reconsideration of the Memorandum Decision entered herein July 6, 1910, and makes the same and each thereof and the contents of each thereof a part of this affidavit.

That on January 24, 1910, the motion for a reconsideration of the former decision with reference to Hay's lien, the petition with reference to the other parties named in said petition, etc., came on for hearing before the Honorable C. H. Hanford, and the same was submitted upon oral argument, as affiant is informed and believes, and upon the typewritten suggestions of affiant representing himself and said parties; that the relation of affiant to said judgment and the funds arising from the collection of said judgment was that of a trustee or stakeholder; that the Memorandum Decision entered on July 6, 1909, was not followed by any judgment or order as required by the law and rules of Court, nor has there ever been any judgment entered herein with reference to said Hay's lien or his rights thereunder; that the said W. M. Russell was not a party to said proceedings in any other capacity or manner than those persons whose names are set forth in affiant's petition with reference thereto, hereinabove mentioned; that at the hearing on January 24, 1910, the Honorable Judge announced that the parties named in the petition were not before the Court and he declined

a reconsideration of the decision made and filed on July 6, 1909, and that W. F. Hays, on the afternoon of January 24, 1910, served notice upon the firm of McCafferty, Robinson & Godfrey, who were not the attorneys of record herein, that he would present to the Honorable Court an order, being the order distributing costs mentioned herein, on January 25, 1910, at 10:00 o'clock A. M., and that this affiant was absent from said city and returned thereto on the morning of January 26, 1910, and for the first time learned of said order, and that he immediately telephoned the clerk of said Circuit Court and learned from him that Russell and Hays had immediately upon the Judge's signing said order and on the same day withdrawn the following sums from the registry of said court, being a part of the judgment collected upon execution by affiant as aforesaid, and the following sums were paid to the said W. M. Russell and the said W. F. Hays, respectively, from the proceeds in the registry of the Court as aforesaid, to wit:

To W. M. Russell, Seventeen Hundred Ninety Dollars ($1,790.00).

To W. F. Hays, Four Hundred Ninety-six and 33/100 Dollars ($496.33).

And affiant here refers to the records and files in corroboration of this statement and said withdrawal of said funds.

That affiant is informed and believes, and so states the facts to be, that said W. F. Hays is insolvent, and that unless said sum be returned into the registry of this Court that the parties hereto will have no redress against him in the event that the orders of this Honorable Court are reversed upon appeal;

that so far as affiant is informed and believes the said Russell is entirely solvent and responsible, but affiant submits that this fund should be kept in the registry of the Court to await the judgment and orders of the Appellate Court; that affiant, in justice to the parties for whom he holds this money as trustee and stakeholder, and upon request, feels it his duty to have the decisions of this Honorable Court with reference to said alleged lien of the said Hays and the orders made with reference to said fund reviewed by the higher court, and therefore desires to perfect the record for that purpose, and will proceed as rapidly as the rules of Court permit to perfect the appeal and have the supersedeas bond fixed and all rights with reference thereto so far as Russell, Hays, et al., are concerned protected.

That if affiant permits this fund to remain out of the registry of the court, withdrawn as it has been, without any effort to cause the same to be refunded and repaid into the registry of the court, it may be claimed upon appeal that so far as these sums are concerned and these parties are concerned there has been an end of this proceeding.

That from the time of said hearing with reference to the matters hereinabove referred to and the entry of the order on January 25, 1910, this affiant had no notice and no opportunity or time to give notice of appeal or to prepare the papers to perfect an appeal from the ruling of said Honorable Court, to have the same reviewed, and that under the rules and decisions of the Court this affiant had a reasonable time in which to perfect the record herein and pre-

vent said funds from being distributed or to pass beyond the jurisdiction and control of the Court in order that the fruits of said intended appeal might be available to him as trustee, as aforesaid, and that unless this fund is required to be repaid into the registry of the court, a review of the orders and decisions of this Honorable Court in the event of reversal or modification will be fruitless.

That affiant has prepared and filed an application herein for this Honorable Court to fix the amount of the supersedeas bond herein on review.

J. W. ROBINSON.

Subscribed and sworn to before me this 27th day of January, 1910.

JAMES J. McCAFFERTY,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Motion and Affidavit for Order to Show Cause. Filed U. S. Circuit Court, Western District of Washington, Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Respondent.

Show-cause Order.

Now, on this January 28, 1910, upon reading and filing the motion and affidavit of J. W. Robinson herein for a show-cause order against W. M. Russell and W. F. Hays requiring them to show cause why the funds withdrawn from the registry of the court by them on January 25, 1910, should not be returned to the registry of the court, there to remain during the pendency of an appeal from the decisions of the court in that particular, and the court being advised;

It is now ordered that W. M. Russell and W. F. Hays each repay into the registry of this court the sum, for Russell, of $1,790.00, and the sum for Hays, of $496.33, or show cause before this court on February 28, 1910, at the Federal Court Room at 10:00 o'clock A. M., why they should not be required to do so and why said fund should not remain in the registry of the court during the pendency of a proceeding to review said decisions with reference to the distribution of said fund, and this show-cause order shall be served immediately upon the said Hays and upon the said W. M. Russell by leaving with each of them personally a true copy thereof.

Dated at Seattle, Washington, January 28, 1910.

C. H. HANFORD,
Judge.

[Endorsed]: Show-cause Order. Filed U. S. Circuit Court, Western District of Washington. Jan. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

Notice [Concerning Findings of Fact, etc.].

To W. F. Hays and to J. B. Reavis, Solicitor for Hays and to W. M. Russell:

Your attention is hereby called to the fact that the Honorable C. H. Hanford filed in the above-entitled cause his Memorandum Decision on the question as to validity of the lien claimed by W. F. Hays, on July 6, 1909, and that no findings of fact, conclusions of law or decree or judgment have ever been entered herein with reference thereto, and you are hereby notified to present such findings of fact, conclusions of law, etc., as may respond to the Memorandum Decision and the testimony submitted herein, and to make effective said Memorandum Decision in accordance with the rules of this court, on February 28, 1910, at the hour of 10:00 o'clock A. M. of said day, or in the event that you fail so to do the Honorable Judge of said court will be requested to

direct you so to do or permit the solicitors in opposition to said lien claim to do so.

Dated at Seattle, February 23, 1910.

JAMES J. GODFREY,
J. W. ROBINSON,

Solicitors for J. W. Robinson, Assignee of the Judgment for Costs Herein, et al., Respondents.

Service of the foregoing demand and notice admitted February 23, 1910, at Seattle, Washington.

W. F. HAYS.
ROBERT H. LINDSAY.

[Endorsed]: Notice and Demand. Filed U. S. Circuit Court, Western District of Washington. Feb. 24, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

Petition [of R. A. Ferguson et al. to Intervene, etc.].

To the Honorable Judges of said Court:

Come now R. J. Ferguson, Henry Varian, Jack Barberis, B. E. Prentice, Edward Cheasty, J. A.

Baillargeon, J. W. Robinson, Ole Anderson and Julia Ekson, and respectfully represent to this Honorable Court the following facts, based upon which they ask to be allowed to intervene in this proceeding with reference to the distribution of the funds collected herein upon the judgment for costs entered herein, and allege as follows:

1. That the complainants herein entered the above-entitled suit in the above-entitled court, which was a suit in equity, and that the respondents appeared therein, and Marie Carrau, through her attorneys, made defense to said cause of action and that she appealed from the decision of said Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit, and that thereafter a writ of certiorari was granted by the Supreme Court of the United States and upon said writ and upon an appeal being taken by the complainants herein from the decision of the Circuit Court of Appeals to the Supreme Court of the United States the judgment of the United States Circuit Court of Appeals was affirmed, which directed that the action in the Circuit Court be dismissed for want of jurisdiction, and based upon the writ of mandate issued by the Supreme Court of the United States judgment was entered herein dismissing said action, and for costs, in favor of Marie Carrau, on August ——, 1904, for Twenty-six Hundred Nineteen and 90/100 Dollars ($2,619.90); that at the time of the institution of said suit in equity in said Circuit Court the attorneys for Marie Carrau sought and secured a bond for costs on behalf of the complainants for the sum of Four

Hundred Dollars ($400.00), which together with the interest thereon was thereafter recovered by the said Marie Carrau from said bond company, and Four Hundred Ninety-five and 82/100 Dollars ($495.82) credited on said judgment for costs above named; that after deducting certain sums for costs and attorneys' fees in the suit to collect from said bond company the balance was turned over to the said Marie Carrau, and as your petitioners are advised and here so state the facts to be, said Marie Carrau turned over to W. M. Russell, hereinafter mentioned, the sum of Three Hundred Dollars ($300.00) on account for moneys which the said Russell had advanced to the said Marie Carrau for the purpose of carrying on the litigation in the above-entitled cause of action on behalf of the said Marie Carrau in making her defense thereto and in perfecting the appeals herein mentioned, and your intervenors hereby refer to all the records and files herein and by such reference make the same a part of this petition for intervention to the same extent as if the same were fully set forth herein, to wit, the pleadings, order for bond, bond, writ of mandate from the Supreme Court of the United States, judgment, cost bill, etc.

2. That thereafter W. F. Hays, claiming to have been an attorney or solicitor for Marie Carrau in the above-entitled cause, filed a notice of lien claim herein for Ten Hundred Twenty-one Dollars ($1,021.00), but your petitioners allege the facts to be that they had no knowledge or notice of such lien or any claim of that character, except the said J. W. Robinson, until on or about January first, 1910, and they allege

the facts to be upon information and belief, that in October, 1908, the Honorable Judge of this Court issued herein a show-cause order on the said Hays requiring him to establish his alleged lien against said judgment, which came on for hearing in a summary way before the Honorable C. H. Hanford, Judge of said Court, and the said Court made and entered hereon on July 6, 1908, a Memorandum Decision on the question as to the validity of the lien claim by W. F. Hays, but that no findings or decree have ever been entered therein with reference to said matter further than said Memorandum Decision, and that your petitioners had no knowledge thereof, with the exception of J. W. Robinson, until some time on or about January first, 1910; that in some way W. M. Russell was permitted to appear in said proceedings to establish the Hays lien claim, and that in said Memorandum Decision the Court found that the said Russell had advanced for the benefit of Miss Carrau the sum of Fifteen Hundred Dollars ($1,500.00), and directed that in order to reach an equitable adjustment as to the distribution of said funds that the money when collected should be paid to the said Russell in an amount equal to the amount actually loaned by Russell, with accrued interest, in accordance with two written contracts made by Marie Carrau, dated April 7, 1902, and April 19, 1902, and also directed that the surplus, if any, be divided equally between Hays and Robinson, and directed that by reason of the fact that the said Marie Carrau had assigned in writing said judgment for costs to the said J. W. Robinson, and that such assignment had been placed

of record in this cause that the writ of execution for the collection of said judgment, if necessary, should be issued in the name of said Robinson and said money collected and paid into the registry of the court, and thereafter the said Robinson caused execution to issue and the United States Marshal caused a levy to be made upon a portion of the Sullivan Block on First Avenue in Seattle, Washington, and that thereafter and before any sale of said property took place, the owners of the Sullivan Block paid to the Marshal and the Marshal paid into the registry of the court in this cause the full sum claimed under said judgment for costs, as shown by said execution, which aggregated the sum of Twenty-seven Hundred Ninety-six and 58/100 Dollars ($2,796.58), after deducting the Four Hundred Ninety-five and 89/100 Dollars ($495.89) credited on said judgment from said bond company, and that said funds so received were paid into the registry of the court, and that thereafter J. W. Robinson, acting for himself and as stakeholder of said fund so in the registry of the court, filed herein, as your petitioners are informed and believe, a certain petition setting forth the facts with reference to the various amounts alleged to have been advanced to the said Marie Carrau for the purpose of assisting her in making her defense and in maintaining said litigation in the courts aforesaid, and which petition, as your intervenors are informed and believe, is still pending undetermined before said Court; that for the purpose of assisting the said Marie Carrau in defending her alleged rights in and to the property involved in this suit and be-

longing to the estate of John Sullivan, deceased, the hereinabove named persons at her special instance and request, along with the said W. M. Russell, advanced to her the following sums set opposite the names of the parties hereinabove and hereinafter named, to wit:

R. J. Ferguson	$ 950.00
Henry Varian	500.00
Jack Barberis	600.00
B. E. Prentice	300.00
Edward Cheasty	1,000.00
J. A. Baillargeon	500.00
J. W. Robinson	1,325.00
Ole Anderson	75.00
Julia Ekson	350.00

And that each of said amounts were contributed and advanced to the said Marie Carrau for the purposes hereinafter mentioned in the same manner as the said Russell and the said Hays advanced the funds provided for and mentioned in the Memorandum Decision as hereinabove stated, and that said fund became and was a trust fund in the hands of J. W. Robinson, as assignee of said Marie Carrau of said judgment, to the full amount thereof less whatever was necessary to meet the expenses of the Court and the witness fees as shown in the cost bill, etc., and that each of your petitioners is entitled to his or her share pro rata of the whole of said judgment, less said costs, and that they, each and all, have the same rights in and to said fund as the said Russell and the said Hays.

3. That the said Robinson in presenting said petition to the Court, as your petitioners are informed and believe and so state the facts to be, did so believing that as stakeholder it was sufficient to bring to the attention of the Court these facts and the names of the persons with the amounts contributed, in order to have said fund distributed in accordance with justice and equity. That under the orders of the Court heretofore entered herein, without notice to these petitioners the whole of said fund is to be distributed to the said Russell and the said Hays in opposition and without consideration as to the rights of your petitioners, when as a matter of fact, and, as they are informed, as a matter of law, they contributed these sums just as Russell and Hays did and are entitled to share in the distribution of said fund; that if the orders of the Court heretofore entered are to be made effective and be carried out, all of which was done without notice to your petitioners, except as herein stated, the said Russell will receive practically all the money that he advanced to the said Carrau to carry on said litigation, and your petitioners will receive nothing.

That your petitioners' attention has been called to these facts and conditions and they now present to the Court the foregoing facts and ask to be allowed to intervene herein with reference to said trust fund and to be heard with reference to the allegations set forth in this petition of intervention, and that upon the hearing thereof, with all the parties interested in this fund before the Court, judgment be given in accordance with equity, and that said trust fund be

distributed among the various parties who contributed the funds necessary to carry on said litigation, and by reason of which said judgment for costs was secured in favor of the said Carrau; that it is shown upon the records of the Court and upon the admissions made in court and not disputed at the hearing of the right of lien of the said Hays that the said Carrau assigned said judgment to the said Robinson for the purpose of putting it in shape that it might be distributed equitably to all those who had contributed and advanced money to the said Carrau for the purposes hereinabove indicated.

4. That W. M. Russell has in no way intervened in this action and is not a party thereto, but that the orders heretofore issued herein with reference to the claim of said Russell were based upon no appearance by way of intervention or otherwise, and that the Honorable Judge of this court was erroneously of the impression, as these petitioners are informed and believe, that the said Russell was in some way a party to this suit before the Court, and reference is hereby made to the lien claims of Hays and to the Memorandum Decision thereon and to the petition for an equitable distribution of this fund filed herein December 16, 1909, and the motion of the said Hays to strike and the order of the Court therein amending the former Memorandum Decision as to costs, etc., and all these matters are hereby referred to and made a part of this petition; that Marie Carrau is wholly unable to repay any portion of the funds so advanced to her to assist in her defense in this cause, and that it was not only agreed that the fruits of this

litigation should refund these moneys to the various parties herein named, but it is here alleged that unless they receive their pro rata share of the funds collected upon the judgment herein for costs upon execution and paid into the registry of the court, they will be wholly unable to secure any portion of the funds so advanced; that said Marie Carrau is wholly without funds, and that your petitioners must depend upon this fund in order to be reimbursed to any extent whatever; that the said Russell and the said Hays each at all times mentioned in these records knew of the funds having been advanced by the various parties to this petition and the amounts advanced by them, and each knew the agreement and understanding with the said Carrau as to the fruits of this litigation, and at the time that said Russell asked for and received the funds which the records show he withdrew herein he knew that these petitioners were claiming a portion of that fund and all the circumstances surrounding the loan of the money to Carrau to assist in her defense.

Wherefore, your petitioners pray that they be permitted to intervene herein with reference to said fund and be permitted to show the amount of money they advanced, and that all persons who so contributed under an agreement, as your petitioners did, that the moneys should be refunded to them out of any fruits of the litigation, shall be treated alike and the fund distributed pro rata and in accordance with equity, and that notice be issued in the usual manner to the said Russell and the said Hays, and that a

hearing be had and the whole matter adjusted and said fund distributed.

JAMES J. GODFREY,
J. W. ROBINSON,
Solicitors for Petitioners.

United States of America,
State of Washington,
County of King,—ss.

R. J. Ferguson, being sworn, says, he is one of the petitioners herein; that he has read the foregoing petition, knows the contents thereof and believes the same to be true; that he verifies this petition in intervention for and on behalf of all the petitioners named and for the benefit of all who have or claim an interest in and to said fund.

R. J. FERGUSON.

Subscribed and sworn to before me this 23d day of February, 1910.

J. W. ROBINSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Notice of Petition in Intervention.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

To W. M. Russell and W. F. Hays and to Their Solicitors:

Take notice that the foregoing petition in intervention will be presented to the Circuit Court at the Circuit Courtroom at Seattle, Washington, on February 28, 1910, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at which time the Court will be requested to permit the parties named to intervene herein in so far as the matter relates to the fund in the registry of the court collected on execution herein upon the judgment assigned by the said Carrau to said Robinson.

JAMES J. GODFREY,
J. W. ROBINSON,
Solicitors for Petitioners.

Service of the foregoing notice and copy of the petition in intervention admitted this February 24, 1910.

W. F. HAYS,
ROBERT H. LINDSAY,
For Russell.

[Endorsed]: Notice and Petition. Filed U. S. Circuit Court, Western District of Washington. Feb. 24, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

United States Circuit Court for the Western District of Washington.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,
Complainants,
vs.
TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,
Respondents.

Special Appearance [of Attorneys for W. M. Russell].

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for W. M. Russell, in the above-entitled cause; and service of all subsequent papers, except writs and process, may be made upon said W. M. Russell, by leaving the same with

REYNOLDS, BALLINGER & HUTSON,
Office Address: 533 Pioneer Bldg., Seattle, Wash.

[Endorsed]: Special Appearance. Filed U. S. Circuit Court, Western District of Washington, Feb. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order or Decree Denying Petition to Intervene.]

In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,

Complainants,

vs.

TERRENCE O'BRIEN et al.,

Respondents.

ORDER DENYING PETITION OF INTERVENORS.

On this 28th day of February, 1910, petition of R. J. Ferguson, Henry Varian, Jack Barberis and others to be allowed to intervene in the above-entitled proceeding with reference to the distribution of the funds collected therein upon the judgment for costs, came on for hearing, J. W. Robinson, Esq., appearing for petitioners, and W. F. Hays, Esq., appearing specially in behalf of himself and W. M. Russell and Chas. T. Hutson appearing specially in behalf of W. M. Russell, said special appearance being for the purpose, and for the purpose only, of questioning the jurisdiction of the Court, and argument of counsel being had and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that said petition to be allowed to intervene be, and the same hereby is denied.

Done this 28th day of Feby., 1910.

C. H. HANFORD,
Judge.

To the foregoing order, said R. J. Ferguson, Henry Varian, Jack Barberis and others, by their attorney, hereby excepts, said exception being allowed.

C. H. HANFORD,
Judge.

[Endorsed]: Order Denying Petition of Intervenors. Filed U. S. Circuit Court, Western District of Washington, Feb. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order or Decree Denying Request for Findings.]

In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Respondents.

ORDER DENYING REQUEST FOR FINDINGS.

On this 28th day of February, 1910, the application requiring W. F. Hays and W. M. Russell, by their said attorneys, to present findings of fact and

conclusions of law responsive to the Memorandum Decision filed herein on July 6, 1909, came on for hearing, J. W. Robinson, Esq., representing himself, and W. F. Hays, Esq., appearing specially in behalf of himself and W. M. Russell, and Chas. T. Hutson appearing specially in behalf of W. M. Russell, said special appearances being for the purpose, and for the purpose only, of questioning the jurisdiction of the Court, and argument of counsel being had and the Court being fully advised in the premises;—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that said request for findings be, and the same hereby is denied.

Done this 28th day of Feby., 1910.

C. H. HANFORD,
Judge.

To the foregoing order, said J. W. Robinson excepts, said exception being allowed.

C. H. HANFORD,
Judge.

[Endorsed]: Order Denying Request for Findings. Filed U. S. Circuit Court, Western District of Washington, Feb. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Order or Decree Fixing Amount of Bond on Appeal and Concerning Repayment of Moneys into Registry of Court.]

In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,

Complainants,

vs.

TERRENCE O'BRIEN et al.,

Respondents.

ORDER GRANTING SUPERSEDEAS AND REQUIRING RETURN OF FUNDS.

On this 28th day of February, 1910, the show-cause order heretofore issued in the above-entitled matter requiring W. F. Hays and W. M. Russell to appear and show cause why funds in the registry of the court distributed to said W. F. Hays and W. M. Russell should not be returned into the registry of the court pending appeal, came on for hearing, J. W. Robinson, Esq., appearing for himself, and W. F. Hayes, Esq., appearing specially in behalf of himself and W. M. Russell, and Chas. T. Hutson appearing specially for W. M. Russell, said special appearance being for the purpose, and for the purpose only, of questioning the jurisdiction of the Court, and argument of counsel being had and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED,

1. That a supersedeas bond on appeal from the order of distribution heretofore entered herein be, and the same is fixed in the sum of One Thousand ($1,000.00) Dollars;

2. That upon the filing of said supersedeas bond by J. W. Robinson in the Clerk's office of this Court, and the approval of such bond by this Court, that W. F. Hays repay into the registry of the court the sum of Four Hundred and Ninety-six and 33/100 ($496.33) Dollars, and that W. M. Russell repay into the registry of the court the sum of Seventeen Hundred and Ninety ($1790.00) Dollars, said sums having been withdrawn from the registry of the court on an order of the Court heretofore entered herein on January 25th, 1910.

Dated this 28th day of February, 1910.

C. H. HANFORD,
Judge.

To the foregoing order, and all thereof, said W. F. Hays and said W. M. Russell, by their said attorneys, duly except, said exceptions being allowed.

C. H. HANFORD,
Judge.

And to so much of the foregoing order requiring a supersedeas bond in the sum of One Thousand ($1,000.00) Dollars, said J. W. Robinson duly excepts, said exception being allowed.

C. H. HANFORD,
Judge.

[Endorsed]: Order Granting Supersedeas and Requiring Return of Funds. Filed U. S. Circuit Court, Western District of Washington, Feb. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,

Complainants,

vs.

TERRENCE O'BRIEN et al.,

Respondents.

Order [or Decree] Granting Motion to Strike Petition of J. W. Robinson to Distribute Funds Pro Rata.

On this 24th day of January, 1910, the motion to strike the petition of J. W. Robinson requesting distribution of funds collected in the above-entitled matter upon the judgment for costs pro rata instead of in accordance with the memorandum decision heretofore entered herein on July 6, 1909, came on for hearing, J. W. Robinson, Esq., having filed a written brief therein on his own behalf, and W. F. Hays, Esq., appearing for himself and W. M. Russell, and argument of counsel being had and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the motion to strike the petition of

said J. W. Robinson requesting distribution of funds collected in the above-entitled matter upon the judgment for costs pro rata instead of in accordance with the memorandum decision heretofore entered herein on July 6, 1909, be and the same hereby is granted.

Dated this 28th day of Feby., 1910.

C. H. HANFORD,
Judge.

To the foregoing order J. W. Robinson excepts, said exception being allowed.

C. H. HANFORD,
Judge.

[Endorsed]: Order Granting Motion to Strike Petition of J. W. Robinson to Distribute Funds Pro Rata. Filed U. S. Circuit Court, Western District of Washington, Feb. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Western Division.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

Bill of Exceptions and Proceedings at Trial of the Establishment of the Lien Claim of W. F. Hays Herein.

This was a proceeding upon a show-cause order against W. F. Hays requiring him to establish his lien claim filed herein in which he claimed a lien against the judgment for costs herein, which judgment had been rendered in favor of Marie Carrau and against the complainants in the above-entitled cause, and thereafter assigned upon the records herein to J. W. Robinson by Marie Carrau, and based upon said lien claim proceedings were had as shown by the record herein, being the shorthand notes taken at the time and extended, and which are in words and figures as follows, to wit:

[Proceedings Had October 30, 1908.]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

Now on this October 30, 1908, this cause coming on for hearing upon the show-cause order issued herein against W. F. Hays requiring him to establish his claim of lien herein before the Honorable C. H.

Hanford, Judge, W. F. Hays appearing in person and with him appeared the Honorable J. B. Reavis, a solicitor of this court, and J. W. Robinson, assignee of the judgment herein, appeared in person and with him appeared James J. Godfrey, solicitors in opposition to said lien claim, and thereupon the following proceedings were had:

Mr. REAVIS.—If your Honor please, I was quite recently spoken to by Mr. Hays with reference to this case, and upon an examination of the papers before the Court it would seem that it is all of record in the contracts that are here, for counsel fees, and there is a dispute or controversy between counsel as to a certain fund. It occurred to me that this fund is not available—not yet in the custody of either one of them, and it would seem that first the fund should be placed here and this controversy taken up at that time.

COURT.—The Court has issued an order to show cause in order to settle the question as to who was entitled to take the necessary steps to get this fund. Mr. Hays has initiated proceedings to collect it, and on examination of the record I find that he is not entitled to proceed in that manner on his own initiative. Now, if there is anything further to be done, it ought to be ascertained who should push the matter.

Mr. HAYS.—If there is any way to get this money in court and settle it afterwards I am perfectly willing. It is a matter of small concern to me.

COURT.—The clerk will not issue any more writs on the praecipe of Mr. Hays. Now, whether any-

body else can get a writ is a matter I don't know about.

Mr. HAYS.—May it please your Honor, so far as the issuance of writs are concerned, I am perfectly willing, in fact anxious to be relieved of that duty, but this judgment was rendered by the Supreme Court of the United States and entered in your Honor's court here, against these defendants about two years ago. No step has been taken to enforce its collection. So far as the distribution of the money is concerned I have an interest in this judgment to the extent of moneys that I myself have advanced in the case to which I would be entitled to a final order of this Court, and the others who have advanced funds for the plaintiff in the original suit. This controversy now seems to me quite premature. As your Honor has said, however, an order has been entered by your Honor citing the defendant to show cause. I was not aware that such an order had been entered, but I received a communication from counsel here showing a reason why at this stage there should be a definite interest made to appear before this Court in this judgment. I filed a lien as a counsel in the case, as attorney in the case, upon the judgment, for the purpose of preserving the fund to the time that the money might be subject to distribution, and then if that lien is improper or illegal it will be the duty of the Court to determine. Much money, perhaps, may yet be expended in the enforcement of this judgment. It may be necessary to again appeal this case to the Supreme Court of the United States, as learned

counsel against whom this judgment rests seems determined not to pay it. Your Honor entered judgment some four years ago for this original sum, from which judgment an appeal was taken to the Supreme Court of the United States. I am informed and understand it is not the purpose to pay this judgment, but to indefinitely postpone and defeat it, and it occurs to me that this controversy between counsel, the assignee of this judgment, and myself, is entirely premature and can be of very little avail. In the attempt to enforce this judgment some few weeks ago it was necessary to expend something like fifteen or twenty-five dollars. It could not be said that this money was expended in a suit or cause unauthorized. It is the duty of counsel in every case to so conduct the case that the defendant or plaintiff in the case shall have the fruits of whatever they get in the form of a judgment. I was not encroaching upon my rights, and understood my right or duty as counsel in the case to insist upon the enforcement of that judgment, and your Honor in issuing that order, it was with full authority and in fact it is the duty of this Honorable Court to have issued the order, and to have proper garnishment proceedings taken in the case. The record shows that this lien was effected or filed according to the statutes of this state. It was authorized. Now, it would not be contended—I do not contend for one moment that one dollar of that money if paid into the treasury of this court, that it would be distributable until there was a determination by this Court as to who had a right to re-

ceive it. I should be very glad to be relieved of the trouble and the liability. I have more to do than I can actually do just now to undertake to collect the enforcement of this judgment against this recalcitrant defendant. I could get on the witness-stand this morning and tell your Honor just what money I have paid out. I know I have paid out hundreds and perhaps a thousand dollars I would not charge against this judgment. I do not see how, even if your Honor has all the evidence in on the side of the plaintiff, as assignee, or on the side of myself, who seeks to enforce the lien for moneys advanced, —I do not see how your Honor could now determine how much the interest would be in the judgment. If I can relieve your Honor of any embarrassment in any way it is my pleasure to do so. I have no controversy with counsel or controversy with this plaintiff, Miss Carrau, as to how this money shall be distributed, but I only want to enforce the judgment, and it seems to me that it would be almost impossible to arrive at a conclusion. Say your Honor would find I have a half interest in this and Miss Carrau has another half. Miss Carrau's assignee is unwilling to proceed according to my information as to how it should be enforced and trouble arises,—one-half of the judgment claimed by her assignee and another half or fourth or whatever it may be by myself, how are we going to proceed? We are not in harmony; we do not agree on the theories of the law. Learned counsel has his views and I have mine and we do not agree, but it seems to me this is not subject to determination to-day. It would be equiva-

lent to a distribution of this judgment if your Honor should make a judgment to-day that one portion belongs to Hays and the other portion to Robinson. Here we would be operating at off purposes, and I do not see how it would be consistent that we go ahead and determine. Now, as far as I am concerned, I am perfectly willing to go ahead, if I can relieve the Court. All I want is this: I want that judgment enforced and this Court would be absolutely in control of this money until it is finally paid out, and could not be paid out as the record stands now without an order from your Honor, and it seems to me it is in the treasury of this court at this time. I do not think counsel will contend that there has not been some money expended and some money advanced in the case. I do not think he will contend that for a moment, and if the amount be ever so small it would be subject to a future distribution. As I have said, however, let Mr. Robinson take and assume the duty of enforcing the collection of that fund and pay it into this court, or let Mr. Robinson agree upon some outside party to do that, and I will be willing that my portion shall bear its equal proportion for the trouble and expense. I am willing on the record of this court—I do not have to do it, but in open court I state I am willing to have your Honor dictate who shall enforce the collection of this judgment. I would be glad to be relieved of that burden. I do not want it and I do not see any necessity for trouble between counsel or warfare as to how the money shall be distributed if it ever shall be obtained.

Mr. ROBINSON.—If your Honor please, of course this application has been made for this show-cause order and the reason for bringing it to the attention of the Court was it might be disposed of. I have been unable to seek an enforcement of this judgment while Mr. Hays was contending that he was the only attorney in the case who had any right to move in the matter, and this has been his contention upon the record—as shown by the record. I do not think that the presence of the money in the registry of the court has anything whatever to do with the settlement of the lien of Mr. Hays, or his right to a lien. That is a matter that ought to be investigated and determined without any regard to the distribution. That is an after consideration should ever this money be collected. I certainly cannot be expected to seek to enforce this judgment while it is disputed as to who is the attorney in the case, and certainly I have no quarrel with Mr. Hays about the matter; only I want to settle it. Now, our statute requires that the Court shall summarily inquire into the facts on which the claim of lien is founded and determine the same, and it seems to me as though at this time your Honor ought to proceed to hear that question as to whether or not he has a lien. We are here for that purpose to-day as we understand it.

COURT.—You may go on, I will hear it. (To Mr. HAYS.) You may proceed in your own way to show me you are entitled to proceed. You are here now to show me you are entitled to the lien.

Mr. HAYS.—I guess it will not be questioned but I was employed as counsel. I will introduce the

copies of the contract if it is denied. Must I prove it?

Mr. GODFREY.—Yes.

Mr. HAYS.—I have, may it please your Honor, memorandum of copy of contract entered into between the plaintiff in this case, Marie Carrau, and myself. The copy, however, is not certified and the original is in my papers. I have not been able to get a number of things this morning, I have been engaged in other matters and I don't think, if the lady has a copy herself, I don't think but what the copy is sufficient for the purposes of this investigation.

Mr. GODFREY.—We would like to have Mr. Hays sworn before this proceeding goes any further.

(Whereupon Mr. Hays was duly sworn by the clerk of the court.)

[Testimony of W. F. Hays.]

Mr. HAYS.—I will offer this contract as a copy of an original contract entered into on the 10th day of October, 1900, the original of which I have among my papers but which I was unable to lay my hand on this morning, and I ask at this time that the defendant, Marie Carrau, be ordered by your Honor to produce the original a copy of which she also has.

Mr. GODFREY.—We will have to object. We demand that the original be produced.

COURT.—If you have the original or duplicate of the original you can produce it.

Mr. GODFREY.—Mr. Hays just testified—this contract I never saw or heard of before and Mr. Hays stated he has the original in his office. We

(Testimony of W. F. Hays.)

have no copy. We never knew of the existence of this contract. The contract we have bears the date of October first, 1901.

COURT.—You may produce that.

(Mr. Hays reads contract, and the same is admitted in evidence as Exhibit 1.)

Mr. HAYS.—I wish to read a copy of the first contract entered into with the lady. This is dated October 10, 1900.

COURT.—I cannot admit a copy.

Mr. HAYS.—I will furnish the original and the signature of the party. I guess I can prove the signature.

Mr. ROBINSON.—He may use this copy with the understanding he presents to your Honor the original.

COURT.—All right, you may read it.

(Mr. Hays reads contract, and the same is admitted in evidence, as Exhibit 2.)

Mr. HAYS.—I offer another copy of a contract in which J. W. Robinson was employed. It is not the original and if counsel objects to it I would like him to produce the original.

Mr. GODFREY.—What is the purpose of this?

Mr. HAYS.—That lien claim is being combatted by an innocent purchaser, an assignee, who I want to show this Court was cognizant of every step in this case, knows of all the things that have taken place in the case from its inception. I can show he was associate counsel in this case.

(Testimony of W. F. Hays.)

COURT.—You don't have to meet or anticipate any defense of that kind. Show what your rights are; that is all you are required to do.

Mr. HAYS.—I want to introduce this contract to show your relation in this case.

COURT.—That is not a relevant question. If you show you have a lien I guess Judge Robinson is not here to get under that by any plea of being an innocent purchaser.

Mr. HAYS.—I offer in evidence a contract—

Mr. GODFREY.—For what purpose? Is this offered for the purpose of establishing the lien? We object to the introduction of this contract between these parties and Mr. Russell on the ground it is incompetent, irrelevant and immaterial.

COURT.—Who are the parties?

Mr. HAYS.—Marie Carrau, myself and William M. Russell.

COURT.—What is the date of it?

Mr. HAYS.—April 7, 1902.

COURT.—Let it go in. I overrule the objection.

(Mr. Hays reads contract, and the same is admitted in evidence as Exhibit 3.)

[Testimony of W. M. Russell.]

W. M. RUSSELL, being first duly sworn upon oath, testified as follows:

Q. (Mr. HAYS.) You have just heard read—I assume you heard, a contract between yourself, Miss Carrau and myself; state to this Court what other moneys than those you have advanced to me or to

(Testimony of W. M. Russell.)

Miss Carrau that was expended in this estate, in this litigation?

Mr. GODFREY.—I object to the form and substance of the question entirely too scattered. It is incompetent and immaterial also.

COURT.—Objection overruled.

A. Shall I state in detail?

Q. Make the sum total?

A. About sixteen hundred dollars; ten hundred and fifty, the exact amount I don't know, was advanced at the first proceeding.

Q. In the Federal Court? State what you have done, if anything, with reference to the recovering of the moneys by you so advanced in the Federal Court.

A. I made no effort to recover them until I spoke to Miss Carrau about it at the time this case was dismissed in the Supreme Court and she promised to assign them to me. She was very friendly. The next day—afterwards she told me she had assigned them to Judge Robinson. I afterwards received a letter signed by Judge Robinson in which he said he was only collecting it to distribute it among the parties who had advanced it to her. I assigned the claim to Mr. Hays for collection about three or four months ago as near as I remember.

Q. Before this notice of assignment to Robinson or after? A. I don't know.

Q. Was it before that letter was received from Judge Robinson?

(Testimony of W. M. Russell.)

A. It was afterwards; I didn't receive any letter from him.

Q. The letter that was exhibited from him; refresh your recollection, Mr. Russell; wasn't your assignment to me made many months before you knew that Miss Carrau had assigned the judgment or attempted to assign the judgment to Judge Robinson?

A. That I don't really know. You could tell that by the date of the assignment. The assignment was for a specific purpose, was it not?

Q. You remember the assignment was made that I should proceed against the judgment in the Federal Court to enforce collection? A. Yes.

Q. And at that time you advanced some money—

Mr. GODFREY.—I object to Mr. Hays testifying.

COURT.—Objection sustained.

Mr. HAYS.—Does the Court understand the amount?

COURT.—Yes.

(Witness excused.)

[Testimony of W. F. Hays—Recalled on His Own Behalf.]

W. F. HAYS, recalled on his own behalf.

About the time of my retention as counsel, the 10th of October, 1900, recognizing the merits and justness of the claim of Miss Carrau and being advised by her that she was entitled—

Mr. GODFREY.—I would like to suggest that as Mr. Hays is represented here in court by counsel, that Judge Reavis propound the questions and Mr. Hays make the replies so we can make objections.

(Testimony of W. F. Hays.)

Mr. HAYS.—I thought the Court was being informed in this case as to the merits and not as to any technical matter.

COURT.—Go ahead.

Mr. HAYS.—At this time I learned of the situation of affairs and understood it was necessary, of course, from time to time to hypothecate prospective interests in this property in some form to raise money to litigate the matter; that it would be a very long drawn out and stubborn litigation, so I talked with Miss Carrau concerning the matter of getting some ready money to start in, and she was acquainted with Mr. Russell, and Mr. Russell was acquainted with her and was favorable to her and desirous to see her succeed in the establishment of her rights, and by appointment I met with her and Mr. Russell and we talked over the case. I went into the case very fully with Mr. Russell, and he, through his desire for her success, advanced in the first instance the sum of about two hundred fifty dollars as I recall. He gave Miss Carrau a check; I think it was for two hundred or two hundred and fifty, I have forgotten which it was. I think that was the first money that Mr. Russell gave. Miss Carrau drew that money; one-half she kept and one-half she gave to me. She needed money for her own uses. I advised her not to work out, not to give lessons, not to teach, and it was necessary for her to teach to make her living (Now, you need not laugh, Miss Carrau, what I tell you is true). I advised against her doing that because I thought there would be efforts made to mislead her and to have

(Testimony of W. F. Hays.)

her make statements that might ultimately confuse and defeat her in the establishment of her rights in the fight that was bound to come. I told her that she was not well dressed; that she ought to be dressed in mourning.

Mr. GODFREY.—I am going to object to this extraneous matter.

Mr. HAYS.—The first thing I did was to advance thirty dollars. That was the first advance; the next advance I made.

Mr. GODFREY.—What was the date?

A. About the 10th. About the time of the employment. She and her two sisters were present at the time. It was first supposed she would need ten and I first offered to give the ten and then it was understood that it required ten for each one, so I gave twenty more, which was thirty; that was the first advance.

Mr. GODFREY.—When was that?

A. The same time; about the 10th of October, 1900. The next moneys that I paid out direct for her was in filing the petition to probate the will in the Superior Court of King County. That was on the 8th of March, 1900.

Mr. GODFREY.—1901 you mean?

A. Yes, 8th of March, 1901. The next moneys I advanced—

Q. How much was that, Mr. Hays?

A. Really, I don't remember. A few dollars; five or ten dollars, a small amount. Had naturalization papers taken out for her December, or rather

(Testimony of W. F. Hays.)

citizens' papers. And the next moneys I advanced was in the United States Circuit Court to appear here in defense against a suit that had been instituted by Hannah O'Callahan and Edward Corcoran to contest this decree of probate. That was sometime in June, I think, of 1901. I think the first payment was ten dollars. I don't know just exactly, but not less than that. And directly after that I paid out moneys for stenographic work of which I kept no account, but an immense amount of work was done by private stenographers for which I paid. The case was referred by this Honorable Court for taking testimony before a Master, but before that was done I must say that depositions were taken in Ireland by the complainants to establish heirships. It seemed to me it would be necessary to have the defendant represented by counsel in Ireland and to this end I had correspondence with them from time to time, and I sent for the first thing, I think, something in the way of an affidavit, five or ten, I have forgotten now just exactly. Later on I sent one hundred.

Mr. GODFREY.—When was this you sent the five or ten?

A. I can't tell; it must have been in the year of 1901. It may have been 1902. It must have been the latter part of the year 1901. I think I could get the original papers, but as I stated to you I mislaid them this morning. I can find them in the course of time. I never lost papers. I never did. The next thing I did was to send to Donogan one hundred

(Testimony of W. F. Hays.)

or one hundred and fifty dollars. I have the receipt. I telegraphed it—

Q. Will you give us the dates?

A. It will be impossible to give the exact dates.

Q. Approximately?

A. It must have been along in September or October or November. Along in the fall of the year; might have been the following year. I don't know when. It was during the contest of that will; to take the testimony. I have no doubt that the Western Union Telegraph Office here has duplicates of these various telegrams. I sent in all four hundred fifty dollars as my recollection is. It was four hundred or four hundred and fifty. I have the originals somewhere among my papers. The original receipts of the telegraph company here. Their books will undoubtedly show just the dates and the amount sent by me to these people. I paid for copies of the statutes of Pennsylvania and for copying off and searching them out in the library at San Francisco in my search and effort to run down the original of the law referring to nuncupative wills, and on that trip in charging Miss Carrau with nothing of that except the expense of the library; that would be properly chargeable. My personal expenses I did not charge up to her as any claim against her at all. I made two or three trips to San Francisco in the interest of these defendants. The next money that I advanced was one hundred nineteen dollars.

Q. How much was that?

A. Not over ten dollars; something like that.

(Testimony of W. F. Hays.)

The next advance I made was for the purpose of printing a brief; a brief of the case appealed to the United States Circuit Court from this Honorable Court. I wrote and had a brief printed here which was filed and on which the case was ultimately tried in the United States Circuit Court of Appeals. I paid, I think it was one hundred nineteen dollars for the printing of that brief.

Q. When was that?

A. It was either February—why, it was within a very few days of the time the case would be dismissed in the United States Circuit Court for not having the brief filed in that court. If it had been one day later under the rules of that court this case would have been dismissed in the United States Circuit Court of Appeals, as I understand the law and the rules. I filed that brief in this court to be sure it would be there in time and I telegraphed to the clerk of the United States Circuit Court I had expressed it to him by Wells-Fargo Express and for him to wire me the date of its receipt and filing in that court that I might know it was filed there in time.

Q. Do you recall that date?

A. I think it was about the 26th or 28th of March, 1902 or three. But that is of public record. It was eleven days before the hearing of the argument in that case that that brief was filed in the United States Circuit Court of Appeals. That was one hundred nineteen dollars, as I recollect it. I afterwards in the Supreme Court of the United States filed a mo-

(Testimony of W. F. Hays.)

tion which I had printed, to dismiss the appeal that was taken from the United States Circuit Court of Appeals to that court by the contestants, and accompanying the motion I also filed a brief in support of that motion, both of which were printed separately, at an expense of something like twenty-five dollars. About twenty-five dollars was the expense of these two documents. I then filed in connection with that a separate brief subsequently in that court and associated with me in the case was the late Senator John H. Mitchell. He was on all the briefs on the motion to dismiss and on the brief in support of that motion and on the brief on the merits of the case. I made two trips to Washington City. I didn't charge them, however, on this case. While I was there there was a movement made in the State court I knew nothing about, but when I came back I found the Supreme Court of this State had taken hold of the case and had assumed jurisdiction of the case, as I thought without basis, and I filed a petition for rehearing in that court; also with the late Senator John H. Mitchell. We spent several days in looking up the records and books and finally we filed a petition for a rehearing for the purpose of carrying the case to the Supreme Court of the United States on a writ of error. That petition was quite lengthy. It cost several dollars stenographic work. Probably it would be safe to say twenty or twenty-five dollars; certainly not less than ten or fifteen. I have forgotten what I paid the stenographer. I had a stenographer at work for several days while we were there in attendance.

(Testimony of W. F. Hays.)

Q. Will you please give us the items, the dates and amount? A. That would be impossible.

Q. Approximately?

A. That is what I am endeavoring to do, is to approximate these several amounts. I have since instituted proceedings in the State court now pending before Judge Morris in which I seek to establish Marie Carrau's right to that property and the property of the estate of John Sullivan, and it is prepared in such a form and manner in the event of defeat in the State court I shall carry it to the Supreme Court of the United States. The expense of writing the petition in that case has been a little over one hundred dollars, writing the petition, getting records and copies, etc., and I actually paid to the stenographer for the work of writing in, I think, fifty-seven dollars. Of course I paid a filing fee in that court and that is an expense, I think, incident to Miss Carrau's rights as a part of my general employment and retainer by her. That case is pending. Of course it would not be decided and could not by the ordinary routine of time in passing through these various courts; could not be determined under three or four years, maybe four years. If things go well and we get quick action might get it through the Supreme Court of the United States in two years and a half, but I hardly think it. I have absolute confidence in the result. I have no fear whatever but what I will win out. I do not expect to win out in the State court and I think it is going to cost three or four thousand dollars to carry that case through.

(Testimony of W. F. Hays.)

The records are voluminous and have to be copied, transcribed and then printed—

COURT.—All that matter in the future is immaterial here now.

A. I want to say I have a contingent interest in the future that is what I stated that for.

COURT.—Is this money you have expended your own money or Mr. Russell's?

A. Part of it was Mr. Russell's. The moneys I sent to Ireland was Mr. Russell's at that time, and of course you understand I could not tell. The funds were mingled and I paid it out when it was necessary to pay it out.

Cross-examination.

Q. (Mr. GODFREY.) Did you keep any books with reference to the disbursements you made on behalf of Miss Carrau with reference to this Sullivan matter? A. What is it?

Q. Did you keep any books or did you take any vouchers or receipts for disbursements you made on behalf of Miss Carrau in reference to the Sullivan estate in the Federal Court, the first proceedings?

A. I don't know whether the clerk ever issued any receipts to me or not, I am not certain whether I took any receipts. As far as the money sent to Ireland is concerned I did have receipts from the Western Union Telegraph Company.

Q. Can you produce them?

A. Yes, I think so, without any doubt.

Q. And you will? A. Yes.

(Testimony of W. F. Hays.)

Q. Did you keep any book accounts at all in reference to the disbursements for and on behalf of Marie Carrau?

A. No, I never did; never kept any account. I remember these items.

Q. You are testifying from memory now?

A. Altogether.

Q. You heard Mr. Russell's testimony, Mr. Hays?

A. Yes.

Q. You remember that he stated that he handed you sixteen hundred dollars, altogether, for Miss Carrau?

A. Yes, he advanced to Miss Carrau in connection with this joint litigation. I think Mr. Russell did not clearly define himself, The moneys he advanced to me or through me that were used by me were really used in the Federal Court; they were not used in the State court, and I think there was five hundred dollars by him so advanced that was used exclusively in the State court; that is my understanding in talking with him.

Q. Do you recall, Mr. Hays, Mr. Russell having advanced Miss Carrau four hundred twenty-five or four hundred fifty—two hundred and fifty, and you borrowed it from Miss Carrau and told her you would return it in a few days?

A. No, under no circumstances. Miss Carrau was, as I stated, needing money. We got this two hundred twenty-five from Mr. Russell, two hundred fifty; it was not to be used for our personal uses. Miss Carrau gave me of the two hundred fifty, one

(Testimony of W. F. Hays.)

hundred twenty-five dollars at the time, and she needed the money for her own uses and for the time being I did not need to use that amount of money, did not need it at that particular time. Consequently I thought it was entirely proper for her to have one hundred twenty-five. I went on the note to Mr. Russell, as I recollect it, and signed the note jointly with her for the two hundred and fifty.

Q. Mr. Hays, is it not a fact that Mr. Russell was a friend of Miss Carrau's and was furnishing this money for her?

A. I assumed that, of course. I don't think Mr. Russell would have furnished Miss Carrau this money out of his friendship had it not been for my assuring him of the possibility of her winning this large estate. I do not think Mr. Russell anticipated Miss Carrau would use any portion of this money for her personal uses. We did not take it that way when we were talking to him. I am certain Mr. Russell would not have advanced Miss Carrau a cent of money but for what I represented to him about that estate.

Q. Do you remember the time of making this first contract you have introduced here to-day?

A. It shows the date.

Q. October 10th, 1900. You remember the conversation preliminary to making that contract?

A. Substantially.

Q. I want to know if you did not at that time promise Miss Carrau you would furnish the expense incident to that litigation?

(Testimony of W. F. Hays.)

A. Never at any time?

Q. I think you demand fifty per cent of this estate if you were going to advance anything?

A. After the payment of all expenses. After the payment of all expenses that we were out in the employment of counsel and the payment of fees incidental to the contest; then I was to receive half of the net proceeds.

Q. This fight that you took up on behalf of Miss Carrau was on an ordinary contingent contract, was is not? A. It speaks for itself.

Q. The original contract is not here?

A. You have the original.

Q. Not the first contract. Are you in a position to say definitely and positively that you did not so represent to Miss Carrau at the time she employed you as her leading counsel or as her attorney in this case October 10, 1900?

A. Most certain I never told Miss Carrau I would advance the cost. I told her I would assist in the financing and fighting of the case. We would have to finance it and hypothecate from time to time our interest in the property, our future and contingent interest. That contract speaks for itself. My counsel does not object; he sleeps while I am talking. I say that you know as a lawyer that contract is the contract by which we are bound. Whatever conversations may have been had between Miss Carrau and myself are merged in that writing. She could not testify as to anything or could I. Therefore I

(Testimony of W. F. Hays.)

am not undertaking to do that which the law will not permit.

Q. Who was to advance the costs?

A. Why, Miss Carrau, of course.

Q. Miss Carrau? A. Certainly.

Q. Who was to advance the costs at the time the litigation was started?

A. We could not tell from whom we could get it.

Q. You, as a lawyer, know and must know, and you do know that some person had to advance the costs; did you undertake to finance the matter?

A. Under no circumstances; excepting with the co-operation and consent of Miss Carrau that we would from time to time borrow. As you have seen by this contract, Miss Carrau is to pay a thousand for the use of four hundred twenty-five. Now, that thousand must come out of her property and if it does not I agree to pay it all. I agreed with Mr. Russell that if the case was lost and if there was no property out of which the fund could be returned, then I would repay it and that I would do.

Q. Your memory is failing, and for the purpose of refreshing you I want to ask you this: Do you remember the preliminary conversation which led up to this contract wherein Miss Carrau offered you ten or twenty per cent or some such amount, and you declined and stated you had to have fifty per cent because you were really the defendant in the case?

A. Miss Carrau never intimated the question of percentage or price or anything else of our employment.

(Testimony of W. F. Hays.)

Q. You swear to that positively?

A. Most certainly.

Q. Why was it necessary, Mr. Hays, to draw a second contract after the contract you drew on the 10th of October, 1900?

A. I realized then, as I did not in the first contract, that we were going to have a very stubborn fight. There had been filed as many as twenty or thirty claims of heirship with nearly that many different law firms representing them. I found that there would undoubtedly be adverse interests coming in as the reward for which the battle would be waged was large. There were attorneys who were desirous of making money, making their way in the world, who would be anxious, perhaps, to come into the case, and that they might influence the action of my client to either take adverse views of me or want to benefit and favor some one, and for that reason I made up my mind it was proper, and as a precaution against such a contingency, to draw a contract before I did any actual work in her case that would prevent any such possible clash and would prevent her employing counsel who might in good faith represent her and interfere with my conducting her case and result in her ultimate defeat and my defeat too. As I was taking my compensation wholly out of the results of that fight, must rely wholly upon its results I could not afford to jeopardize the results by leaving it open that she might of her own wish and will employ whomsoever she pleased. The results of the case have shown that

(Testimony of W. F. Hays.)

the employment of other counsel has made a great confusion.

Q. Well, now, Mr. Hays, in what particulars does the contract of March 7, 1901, differ from the contract of October 10, 1900?

A. It prevents her from employing counsel without my written consent. As my recollection of it is the principal reason for the drafting of that contract.

Q. And it gives you a full fifty per cent of the estate upon recovery?

A. It speaks for itself, sir; you can read and you can construe.

Q. It gives you fifty per cent of the estate upon recovery. It does not bind you to do anything except to appear as attorney for Miss Carrau; was that the understanding between you that you simply appeared here as her attorney?

A. Do you read that contract it does not bind me to do anything?

Q. You simply appeared as her attorney, more than that you did not agree to do?

A. Nothing further. I was not her confessor and nothing but her attorney.

Q. And with reference to the financial side of it she was to handle that herself entirely?

A. Not at all, not at all. She was unacquainted with banks and unacquainted with those who would advance money. I expected to have to do that part, to assist her in every stage of the game, which I did.

Q. You overlooked to set it out in your contract?

(Testimony of W. F. Hays.)

A. Well, you are insisting upon my telling you something. You wanted it and I told it.

Q. Do you recall the exact amount of money or approximately the amount of money you assisted Miss Carrau in raising in connection with this litigation?

A. The amount I assisted her in raising?

Q. Yes?

A. I should say in the neighborhood of sixteen hundred dollars.

Q. Do you recall the time, Mr. Hays, in 1902, when the appeal was taken to the Circuit Court of the United States for the District of Washington; do you recall the time you appealed from the decision of the Circuit Court of the United States for the Western District of Washington in connection with the O'Callahan-Carrau matter?

A. Yes, very well.

Q. Did you furnish any of the money for the printing of the transcript of that record?

A. No, I don't think I did. I don't think I furnished any money. I offered to furnish it.

Q. You offered to? A. Yes.

Q. To whom did you make that offer?

A. I made it to J. P. Houser. I made it to Miss Carrau.

Q. Do you know what that record cost to print, Mr. Hays?

A. Not exactly; no. I don't remember. I had a draft of twenty-three hundred dollars and I understood that would be sufficient to cover it and if it was

(Testimony of W. F. Hays.)

not I could get more. Miss Carrau called at my office afterwards and we talked over the matter and she said she would consider the matter and talk it over with her brother and sister, and I didn't see her any more.

Q. This twenty-three hundred dollars was your own personal money? A. Yes.

Q. No interest in this litigation?

A. No, it was not advanced at all.

Q. To whom did you make this offer of twenty-three hundred dollars?

A. I didn't make the offer to anyone, but I said I am prepared to go to the extent of that now, without raising further funds I am prepared to make that payment, and Russell told me he went to Miss Carrau and told her, and I think it was after that she called at my office and she said if she could get it from some other source she preferred to. I realize, as I recall it now, before I went east that the Court's decision would be rendered against her, so I prepared notice of appeal and the bond in blank to be filled out—

Q. Where was this?

A. Here in this court—prepared the bond and the notice of appeal and then when I returned—they had been executed on the blanks I had prepared and I found someone had erased a jurisdictional line in the notice of appeal which would have rendered the appeal futile and—

Q. Now, Mr. Hays, would you state or tell us as near as you can what time you sent this four hundred sixty-five dollars to Ireland?

(Testimony of W. F. Hays.)

A. I answered that several times; do you want me to say it again? I told you it was along—as near as I recollect it, it was while the examination was going on before Judge Smith. I recall one day I got a cablegram and I went over and cabled one hundred and fifty dollars.

Q. Was it prior to February, 1902, you sent that money?

A. It would be impossible for me to tell you from memory, but I can find it and give you that information. It was between 1901 and 1904; that is as near as I can give it to you from memory.

Q. You sent four hundred sixty-five, you testified; have you a check or receipt or some kind of voucher for that expenditure?

A. I don't know; I can't tell you. My papers have accumulated and I have moved twice or three times since and in many instances have thrown them away and others have been mixed up. It has been twelve years since we started pretty near—six years, it seems to me it has been twelve. It has been the longest kind of a siege, I know that.

Q. You have the receipts from the Western Union Telegraph Company?

A. I think I have. I will get those.

Q. You will find those?

A. Yes, I will get those and all the receipts I have. I will get all the receipts I have and bring them in and turn them over. That is all the use I have for them is to show what I actually paid out.

Q. Do you remember sometime in October or

(Testimony of W. F. Hays.)

November, 1901, that Mr. Howe, who was then the senior counsel for the O'Callahan and Corcoran people, securing an order of default against you?

A. Yes.

Q. And afterwards Judge Hanford permitted the case to be reopened on the payment of a twenty-five docket fee, do you recall that?

A. It was not a docket fee. It was twenty-five dollar punishment, penalty.

Q. No, I think not?

A. I think Mr. Howe remitted that to me.

Q. If you have made that as a charge against Miss Carrau or the Sullivan estate you are mistaken?

A. Entirely so. I think Mr. Howe remitted that; that is my recollection. My recollection is I offered to pay the money, but they paid it back or told me never to mind, he would receipt the docket or something like that; I don't know what. My recollection is I never had to pay it. At the time we made a five hundred dollar bet. I bet him three hundred against two hundred I would beat him in the Supreme Court of the United States. I never got the three hundred, though.

Q. Mr. Hays, in your own direct examination you testified to having paid the late John H. Mitchell six hundred dollars? A. In my what?

Q. You testified to having paid him some amount of money, six hundred dollars, I thought you said; when did you pay him this and where?

(Testimony of W. F. Hays.)

A. Oh, I paid Mitchell in Washington City and paid him in Portland and in Olympia, Washington, paid expenses, traveling expenses, made two trips to Washington; brought him out here twice.

Q. Have you kept any book accounts or memorandum of any kind in reference to that?

A. I don't know whether I have or not. I have forgotten whether I have any or not.

Q. Can you recall whether you paid him with gold coin or check? A. Always paid in cash.

Q. Did you usually take a receipt?

A. I don't believe I ever took a receipt from the Senator at any time.

Q. You and he were very good friends?

A. Very good, indeed.

Q. Do you recall giving him this six hundred dollars—was that in Washington City?

A. That was at different times I paid him.

Q. Never took a receipt for these disbursements at all?

A. Never took a receipt for anything I paid him. I don't recall it. I don't think I ever did. I never asked him for a receipt. He might have kept a memorandum—I think he did.

Q. How many trips to the city of Washington, D. C., have you made in connection with this case?

A. Two trips, but I am not charging any lien on this for anything I paid Senator Mitchell or anything I paid out. I am not asking this Court to take that into consideration. I am only asking that the lien I have against this judgment for costs here shall

(Testimony of W. F. Hays.)

be confined to the actual cash payments in connection with this present case.

Q. Can you give the date when Miss Carrau first wrote you a letter notifying you that you no longer represented her—removing you from the case?

A. I have that letter, but I can't tell you just when it was; it was away back in, I think, possibly 1904. It was after the case had been appealed, as I recollect it, or about the time of the appeal to the United States Circuit Court of Appeals. I believe it was before the case was appealed from this Court, but I have the original letter. I am keeping it as a souvenir.

Q. Can you give us the date of it?

A. I have answered your question, I could not, but I gave it as nearly as I could, but I have the original letter and will let you see it.

Q. You will produce the letter this afternoon?

A. I will if I can find it.

Q. In the event you cannot find it we have a copy of it—

A. I won't question it being correct, if she says it is a copy.

Q. At the time, Mr. Hays, that Hannah O'Callahan and Edward Corcoran first came into this case who presented this case to the Circuit Court here in Seattle?

A. Who presented it first on behalf of Miss Carrau?

Q. Did you? A. Yes.

(Testimony of W. F. Hays.)

Q. Who presented the case in the Circuit Court of Appeals for Miss Carrau?

A. I—that is, I briefed the case and about the time that I filed my brief I got a wire from the east of the illness of my wife and I started east at the same time writing a letter and wiring to the party in San Francisco.

Q. (Mr. ROBINSON.) Was it not agreed between you and Miss Carrau when you entered into the contract originally that you were to finance the proposition and were to advance all the costs, whatever they amounted to and didn't you tell her at that time that you had thousands of dollars for that purpose and that you were not to get any expense money back unless you got it out of the suit; unless you won Miss Carrau—was that not true?

A. Absolutely not true.

(Witness excused.)

(Here a recess was taken until two o'clock P. M., of the same day, at which time court convened, all parties present as before, and the following proceedings were had:)

Mr. HAYS.—May it please your Honor, this morning on the introduction of testimony in connection with a copy of the contract with Miss Carrau, I didn't have the original and agreed to bring the original, but have not been able to find it; will you not allow the copy to be used.

Mr. ROBINSON.—We are willing that the copy should remain in. Let Mr. Godfrey examine it to see that it is a copy.

(Testimony of W. F. Hays.)

Mr. HAYS.—You are satisfied it is a correct copy, Mr. Godfrey?

Mr. GODFREY.—Yes.

Mr. HAYS.—I wish to introduce first, the receipts for moneys paid to the clerk of the Supreme Court of this State; a copy of a check given by the Scandinavian American Bank sent there to the clerk of the Supreme Court by the bank for forty-six dollars, upon November 23d, 1905, in pursuance to this letter from the clerk of the Supreme Court. (Mr. Hays reads letter.)

Mr. ROBINSON.—We make the objection to this, it is incompetent and immaterial and not in any way tending to establish the right of lien.

COURT.—I will let it go into the case. It is part of Mr. Hays' offer, subject to the objection.

Mr. HAYS.—I offer in evidence a receipt from Munsing Company, printers, dated January 27, 1903.

Mr. ROBINSON.—We make the same objection to this.

COURT.—Let it go in subject to the objection.

Mr. HAYS.—I stated it was one hundred nineteen and I see it is one hundred seventeen. The other two dollars I cannot account for unless it was the transmission of the briefs and the telegram; I had the figures one hundred nineteen in my mind; it is one hundred and seventeen.

Mr. HAYS.—I offer in evidence now two receipts one dated March 3d, at Seattle, Washington, and is money transferred by cable to Donogan, at Ireland, Cork.

(Testimony of W. F. Hays.)

Mr. ROBINSON.—We offer the same objection.

COURT.—Let it be admitted subject to the objection.

Mr. HAYS.—A check of April 7, 1902, to Collins, of Dublin, Ireland.

Mr. ROBINSON.—Same objection.

COURT.—Let it go in subject to the objection.

Mr. HAYS.—I offer memorandum of checks which were paid and drawn in my favor charging my account in the same bank, Washington National Bank, of even dates with those two drafts or checks.

Mr. ROBINSON.—Same objection to each offer—three of them, aren't they?

A. Yes. There is one I have not the original receipt for. I sent one hundred dollars at one time, and I don't remember, five or ten or fifteen at another time. I am certain I sent over four hundred and fifty. I may be wrong about the exact amount, but I know I sent over one hundred. I see these are one hundred and fifty each. I had no time to go through my things to get the receipts, but I can get them from the telegraph office.

Mr. HAYS.—I offer here a receipt for twenty-seven, printer of Washington, D. C., printing briefs. Those you have seen also, any objection?

COURT.—Let it be admitted subject to the objection.

Mr. HAYS.—Another receipt for seven dollars and eighty-five cents,—Times Printing Company, dated June 14, 1901, for seven eighty-five. It says,

(Testimony of W. F. Hays.)

"Estate of John Sullivan." I know it was in this particular matter, publishing notice.

Mr. ROBINSON.—Same objection.

COURT.—Admit it subject to the objection.

Mr. HAYS.—I have a receipt here, twenty-five dollars, as paid into this court for the default that was referred to this morning. I am inclined to think Mr. Howe paid it back, but I am not sure. I think he did, but I am not sure. It runs in my mind that way. I paid money to the clerk here. Here are a number of small ones I will not bother with. Here is a telegram from John H. Mitchell, for the purpose of showing that Mitchell was working in the case with me endeavoring to establish Miss Carrau's rights in this estate, and dated October 16, 1905, and sent from Portland to here. It is only for the purpose of showing that I was associated with Senator Mitchell in the case, and I have a number of his letters here if it is questioned.

Mr. ROBINSON.—We object to the offer as incompetent and immaterial.

Mr. HAYS.—And the contract of employment I made with him in Washington, D. C., and later in Seattle, I think; I am not sure whether it was here or Portland. For the purpose of showing that Senator Mitchell was in the case. I haven't the original briefs or I could show them here. His name appears on the briefs, that are referred to in this receipt, as associate counsel.

Mr. ROBINSON.—I object to that as incompetent and immaterial.

(Testimony of W. F. Hays.)

COURT.—I will receive them subject to the objection.

Mr. HAYS.—I have a letter from Senator Mitchell of date May 18, 1904.

Mr. ROBINSON.—Same objection.

Mr. HAYS.—You make the same objection to all these letters. I will only offer two or three of them, as I have a stack of them. I brought them on purpose to show the Court. Here is a copy of a letter sent by Senator Mitchell.

Mr. ROBINSON.—They may be offered subject to our objection.

Mr. HAYS.—Here is a letter, it is not very long. This was May 18, 1904. (Mr. Hays reads letters.) I will not encumber the record with more letters, but I have more of them, and if your Honor wants to see them I will show up the correspondence between Senator Mitchell and myself. I will read this letter of April 30, 1904. (Mr. Hays reads letter.) I wish to offer in evidence proof of service of brief. (Exhibit 13.)

Mr. ROBINSON.—We renew our objection.

Mr. HAYS.—(Reading Exhibit 14.) Do you have any objection to the introduction of this?

Mr. ROBINSON.—It is objected to as incompetent, irrelevant and immaterial.

(Mr. Hays reads Exhibit 3.)

Mr. HAYS.—In connection with them I introduce what was, I would say, a cost statement mailed to me by Judge Eben Smith who was then Master in Chancery. In all it was six hundred seventeen dollars.

(Testimony of W. F. Hays.)

How much of that money I paid I don't know. This was four hundred and fifty dollars given him in a note, and I don't know whether he got any more or not, but I know the bill was six hundred and seventeen dollars. I offer this bill simply corroborative that that payment to Eben Smith was justified by the facts.

Mr. ROBINSON.—We object to it as incompetent and immaterial.

COURT.—Let it go in subject to the objection.

Mr. HAYS.—I offer in evidence proof of service of briefs in the United States Circuit Court of Appeals (reading Exhibit 20). There are many payments that I have no receipts for now, and do not know where I can get them and where they are that have been made in connection with the case, that were a legitimate part of the actual necessary outlay in conducting the case, but I wish to say there has been a variance in my statement as to ten or fifteen dollars for the costs of this brief, it turns out to be twenty-seven dollars. That I did not recall in my direct testimony of making any statement about any specific amount that I have overstated in a single instance. The payment of these items that I have referred to and mentioned seemed absolutely necessary to me. I could see no way out of it and had to pay them. I made no charge for my own personal expenses in a single instance and do not intend to do it when there is a final settlement of the case. So far as the cross-question propounded to me about my agreeing to pay the costs of the litigation, it is a matter that might

(Testimony of W. F. Hays.)

be in a sense confusing. The agreement with Miss Carrau, while it is in writing, the preliminary talks we had concerning it all were to the effect that we had to raise the money out of the estate, out of the fund for which we were contesting, and that would be only out of her pocket in the ultimate result; it would be that much less money that she would receive, and in that way she, of course, was to pay. I had to assist in every turn of the case in raising money from divers sources that we might carry on the fight, and it was in that way that Miss Carrau was to pay the expense. She had no ready money and the only money she did have was the money we believed belonged to her that was given her by John Sullivan. I make this explanation so there can be no misunderstanding as to what our agreement was as to how these costs were to be paid. It was to my interest to make them as little as possible. My relation to her being to derive one-half of the result I was careful to keep them down to a minimum that I might get the most possible out of it.

Q. (Mr. ROBINSON.) The money coming from Mr. Russell was to be paid back out of the estate in the event you were successful?

A. Yes, sir.

Q. That is the way with all the money that was received? A. Yes, sir.

Q. Now, this money was all received, was it not, from Miss Carrau's friends?

A. No, indeed. The moneys I paid of my own were received by hard work and not from any friend.

(Testimony of W. F. Hays.)

Q. The money cabled to Ireland?

A. That was from Russell, I think. I don't know it was paid out of my own funds but I think Russell paid from time to time money so it reimbursed it. The day I sent it I probably did not get the money from Russell.

Q. Had you any obligation out on account of any of the money received or that you received for these expenses?

A. Had I any? Yes, I agreed with Mr. Russell in the event that we lost the case I would pay it and I will make it good.

Q. You guaranteed to do that with Mr. Russell?

A. Every dollar he has advanced, every dollar.

Q. But the debt was a debt from Marie Carrau to Mr. Russell?

A. Yes, and I was guaranty.

Q. You haven't made the guaranty good?

A. No, I haven't.

Q. Now, Mr. Hays, the motion to dismiss the briefs in Washington City in the Supreme Court of the United States, you testified to Miss Carrau's attorneys acting for her at that time, you printed and filed a motion to dismiss and briefs on the merits?

A. Not for nearly one year after.

Q. At that time, Mr. Hays, Miss Carrau had notified you to take no action whatever with reference to her or her interests?

A. The exact date when Miss Carrau wrote the letter you prepared for her and she signed it, as I understand it, I don't remember.

(Testimony of W. F. Hays.)

Q. Do you remember what year?

A. I think it was not 1903; it may have been 1902.

Q. All these expenses happened after that date?

A. After that notification?

Q. Yes.

A. No, we had our trial here, the moneys expended before the Master, moneys sent to Ireland and moneys paid into this court in entering our appearance, moneys paid to the printers and probate department. The only actual money that was expended after that notice was this printing of briefs in Washington City, the preparation of this record in the Supreme Court of this State, which was instituted by misunderstanding, as I believe, of counsel, as I believe, as to the legal rights of Miss Carrau—

Q. We will leave out the legal side of it and leave that to the Court.

A. It is a question of whether or not as her lawyer or attorney I had a right to protect her rights in that court.

Q. The only point I wish to emphasize is, you had some misunderstanding by reason of which Miss Carrau notified you not to do anything more in the case for her or in any of the cases?

A. I had already expended too much money and had a contract—

Q. I am not saying you had any contract; is it not true Miss Carrau had notified you not to take any further action or any expense in reference to her interests?

A. Yes, she notified me before I made these ex-

(Testimony of W. F. Hays.)

penses in Washington City. She notified me before I made the expense of preparing the brief, the main brief in the case, in the Supreme Court; that is right, one hundred seventeen, that was incurred after she gave me that written notice.

Q. And before the appeal was taken from the Circuit Court to the United States Circuit Court of Appeals? A. Yes.

Q. Now, the money you received you claim was paid for the briefs, where did you get that?

A. Paid it out of my own pocket.

Q. Did you notify Miss Carrau of any expense or action that you had taken in the Supreme Court of the United States in reference to briefs?

A. No.

Q. Anything with reference to employing Mr. Mitchell or incurring any expense with reference to that matter?

A. I didn't have any communication at all with Miss Carrau. I sent her a letter which she returned to me unopened.

Q. When was that?

A. That was in 1904, I think. I have that letter.

Q. You kept no book account of any of these items you have claimed you have expended on her behalf?

A. No.

Q. And you have no vouchers except such as you presented here, as far as you know?

A. None whatever as far as I know. I might have others but I don't know where they are. I have a letter here that I wrote Miss Carrau and she re-

(Testimony of W. F. Hays.)

turned and I assumed she did not read it, under date of January 13th (an unlucky date), 1904; that is the only communication that I had with Miss Carrau and I will read the letter and let you see it. It has been brought out here there is trouble between Miss Carrau and her attorney—

Q. I am not caring anything about the trouble between you and Miss Carrau, but these expenses have been incurred after notice you received from Miss Carrau, whatever it was?

A. I already told you they were made long before that. January 13, 1904.

Mr. ROBINSON.—Let us try to get at this in the proper order. Will you take the witness-stand? Now, all these sums of money furnished Miss Carrau by her friends was to be repaid, was it not, in the event that the suit was successful in her behalf, and she got this estate?

A. I do not know. I am only speaking and can only answer as to one individual, Mr. Russell. I never had any negotiations with any other friends of Miss Carrau, so if you refer to other friends I know nothing about it.

Q. How about Doctor Ames—didn't you get some money from him?

A. I didn't, but I got his note, which was paid by Mr. Russell later.

Q. And that money went to Miss Carrau because Doctor Ames was Miss Carrau's friend?

A. Doctor Ames didn't pay any money to my knowledge.

(Testimony of W. F. Hays.)

Q. You used his credit by which you got the money and Mr. Russell paid it?

A. That is my understanding; Mr. Russell told me he did and I believe he did.

Q. You got the money on the note?

A. No, Judge Eben Smith.

Q. It passed through your hands, did it not?

A. No, I handed it over to Judge Smith, the note.

Q. That is what I am asking you; you got it by reason of Doctor Ames' credit and took the money and gave it to Judge Smith?

A. Yes, I took and gave the note to Judge Smith. It was not payable for six months.

Q. You accepted the note in lieu of cash?

A. Yes.

Q. And that note was paid by Mr. Russell?

A. That is my understanding.

Q. Doctor Ames was a friend of Miss Carrau and he indorsed the note?

A. Yes, Russell wanted some one else to go on the note.

Q. Tell us, Mr. Hays, how did it happen in the contract you made with Miss Carrau for fifty per cent of this estate, and which is stated in the contract to be of great value, you did not include a clause with reference to who should advance the moneys and pay these expenses and costs, do you recall why you did not put it in?

A. Why, I didn't, for the reason we knew that we had to borrow the money from time to time and could

(Testimony of W. F. Hays.)

not tell where and how we would get it. We knew we had to get it out of the property.

Q. You knew she didn't have it?

A. She had a prospective or contingent recovery, so that we—

Q. You knew she didn't have any money?

A. Yes.

Q. And didn't you represent to her that you had plenty of money to invest in it?

A. No, indeed, I d'd not.

Q. Didn't she try to get you to agree to ten per cent of the estate, and didn't you tell her at that time you had to advance the costs and that it would cost thousands of dollars and you would have to have fifty?

A. I may have explained to her we would have to get down to some total of the net results when the costs and expenses were all paid the estate would be reduced in amount, and that my half would not be very great and her recovery would not be so very very great.

Q. Was that not the theory upon which she agreed to give you fifty per cent of that estate net, that you should advance the costs?

A. Undoubtedly not. She knew better because the next day we went to Mr. Russell and borrowed two hundred and fifty dollars, do you think she would have gone to Russell and bound herself to pay him two hundred and fifty dollars?

Q. Didn't she go because you refused to get the money in accordance with your agreement?

(Testimony of W. F. Hays.)

A. You might figure it out that way; you might dream it that way, but she didn't do it. She went there to get the money and he was the source from which she could obtain it.

Q. That was an entirely personal loan Mr. Russell made to Miss Carrau?

A. Yes, they were all advances made by him for this case; not that she was to use the money in her own private affairs at all. He didn't expect her to spend a penny of that money for any other purpose.

Q. Are you able to determine exactly how much money you paid out of your own pocket as costs?

A. The net expenses in connection with this estate?

Q. Those that went into the costs in the Federal Court?

A. Very close to four thousand dollars.

Q. And you haven't an item or book account or voucher?

A. I haven't. The only book I keep is kept by the bank. I got so much money out of the bank and I spent it and when I got any more I put it there.

Q. Miss Carrau was to pay the expenses, and how does it happen you paid them and never kept any account or—

A. Why, Miss Carrau had no money and this estate was not settled; her property was not vested in her that she could realize any money upon it or borrow any money upon it or do anything.

Q. If you never kept any book account how do you expect to determine how much it did cost?

(Testimony of W. F. Hays.)

A. I believed she would take my word implicitly; I would not by any means charge against Miss Carrau one-half of what it has cost me.

Q. As a matter of fact you could not at this time tell how much you have expended?

A. At the end of the litigation I could not recover one penny from Miss Carrau unless I had a voucher for it and you know it, unless I had a voucher. Now, it was my loss, not hers.

Q. (Mr. GODFREY.) With reference to this four hundred fifty dollars you got from Mr. Russell immediately after making this contract, do you recall what happened to that money, or what was done with that money?

A. I don't really remember. I am inclined to think that was the money I sent to Ireland; I kind of think that was it; I am not sure.

Q. Could you be definite enough to tell the Court whether that was a personal loan made to Miss Carrau or loan made on behalf of this litigation?

A. On behalf of the litigation.

Q. Sure of that?

A. No doubt of it.

Q. Do you remember on that day after Mr. Russell had issued that check and Miss Carrau got the money she went back to your office and you got two hundred dollars from Miss Carrau as a personal loan?

A. Two hundred dollars? No such thing ever happened.

(Testimony of W. F. Hays.)

Q. You are as equally positive you did not borrow this two hundred dollars from Miss Carrau as you are this four hundred twenty-five or whatever it was, was given to further this litigation?

A. I never borrowed any money from her in the world.

Q. You have never borrowed any money from Miss Carrau? You are sure of that?

A. Never borrowed a penny from Miss Carrau.

Q. You are sure of that?

A. Yes. I may have given Miss Carrau receipts for money when she paid it over to me, I don't remember, but I know that in getting any money from Miss Carrau it was moneys I realized or obtained through her from Mr. Russell for the payment of current necessary expenses, either to attorneys in Ireland or court costs.

Mr. HAYS.—I will read this letter I have written Miss Carrau: "January 13, 1904, Miss Marie Carrau:

Mr. ROBINSON.—A letter from you to Miss Carrau? We object. Is it the original?

Mr. HAYS.—Yes.

Q. Went through the mail?

A. Yes, and returned to me; just simply marked returned. (Mr. Hays reads letter.)

Mr. GODFREY.—You will produce these receipts from the Western Union Telegraph Company where you transmitted other moneys to Ireland?

A. Yes, I am safe in saying I can get them; I am

(Testimony of Miss Marie Carrau.)

not sure. I will produce the receipts or evidence I paid the money.

(Witness excused.)

(Close of lien claimant's case.)

Mr. ROBINSON.—In opposition to the lien we call Miss Carrau to the stand.

[Testimony of Miss Marie Carrau.]

Miss MARIE CARRAU, being first duly sworn, on oath testified as follows:

Q. (Mr. ROBINSON.)—What is your name?

A. Marie Carrau.

Q. Defendant in this case with Mr. Terrence O'Brien, you are the Marie Carrau? A. Yes.

Q. Miss Carrau, do you know Mr. Hays?

A. Yes, I do.

Q. You may state what, if any, the agreement was between yourself and Mr. Hays as to the costs necessary to carry on that litigation.

Mr. REAVIS.—So far as the contract is concerned, that was all in writing and the question just calls for the contract and agreement with reference to fees, and we have it all in writing.

COURT.—I will hear the testimony so far as it is competent and relevant.

A. When I went to Mr. Hays, after we discussed the case, he told me he would ask fifty per cent. I told him it was too much, I thought it was too much and I told him I was not willing to give him fifty per cent. "Well," he said, "Miss Carrau, now, you know you have no money and this litigation will cost

(Testimony of Miss Marie Carrau.)

a great deal and I will have to spend my own money and I will have to go to Ireland, maybe two or three times, and it will be a long fight, and I have money and you won't have to worry about money matters."

Q. You wanted him to take it for fifteen per cent? A. Ten per cent.

Q. But he insisted that he would have to pay the expenses and therefore he wanted fifty?

A. Yes.

Q. Now, Miss Carrau, your attention has been called to the contract which you signed here with Mr. Hays. What, if anything, have you to say to the Court with reference to that in so far as it fails to include a clause requiring Mr. Hays to advance the costs?

Mr. REAVIS.—I will object to the form of the question.

COURT.—Overrule the objection.

Mr. REAVIS.—Exception.

A. Mr. Hays drew the contract and he then read it to me.

Q. Read you the contract?

A. Yes, and I agreed to it and signed it, but afterwards when he denied to me to my face that he ever said he would pay the costs; that he was to put up the money, then I looked at the contract and read it over.

Q. You looked up the contract?

A. And found it was all different from the paper he had read to me.

Q. What was the contract, as you recall it, read to you, with reference to the costs?

(Testimony of Miss Marie Carrau.)

A. Yes, it was read to me.

Q. What was that?

A. In reference to the costs it said very strongly that Mr. Hays was to put up the money and that as compensation for his services and for the money advanced he should receive fifty per cent, and it was very strongly worded.

Q. What was to happen, if anything, with reference to the money he advanced in the event you did not win the estate—what then?

A. Of course if we could get the estate he would get the money and if we should not get the estate he would lose it.

Q. What statement did Mr. Hays make, if anything, with reference to where he was to get the money, or whether he had it himself?

A. He said he had money, plenty of money, thousands of dollars of money, and I knew his wife was very wealthy—

Q. Very wealthy, his wife? A. Yes.

Q. How long after this contract was entered into did you learn that Mr. Hays had refused to put up any money?

A. Well, the first time was when he had a letter from Mr. Collins, who was the administrator of the John Sullivan estate, he took care of it, and he had a letter from him, that if he would send him three pounds he would give him very valuable information that Mr. Sullivan left no heirs. Mr. Hays called me on the telephone and read the letter to me and he told me he needed the money to send, and

(Testimony of Miss Marie Carrau.)

he asked me to go to Mr. Russell and borrow it from him. "Now," I said, "Mr. Hayes, is it a fact that you told me you were to put up the money; that I was not going to worry about the money matters?" I said, "I am not going to put up any money for you. I told you I did not want to worry about money matters and you agreed with me that you would put up the costs." "Well," he said, "I haven't got the money." "Well," I said, "I am not going to see Mr. Russell."

Q. He wanted you to see Mr. Russell?

A. Yes, sir. Mr. Russell had gone to Mr. Hays and when he first heard I had sued or that I had a case he went to consult his lawyers and his lawyers told him I had a good case. I went to see him. I used to visit him.

Q. You went to see Mr. Russell?

A. And he said, "Marie, I see you are in trouble, but I have spoken to my lawyers about you and they told me you had a good case and I have several thousand dollars idle money. I want to help you."

Q. Mr. Russell told you? A. Yes, sir.

Q. And he also told Mr. Hays?

A. I told Mr. Russell he had better see Mr. Hays; that he was my attorney and represented me, and he said I am going down. He went there and then—

Q. Now, Miss Carrau, state to the Court fully with reference to the money that you secured to carry on this litigation. Mr. Hays was unable to carry out his agreement as to costs as you understood it? A. Yes.

(Testimony of Miss Marie Carrau.)

Q. And he told you so? A. Yes.

Q. Told you he could not get the money?

A. He hadn't that money. He had not that much to send to Mr. Collins. He said it was thirty pounds, but I found out afterwards it was only three pounds. He always told me he sent thirty pounds.

Q. Tell about these costs and what your relations with them were and what Mr. Hays' relations were.

A. I told Mr. Hays I would not ask Mr. Russell for money, but then I was afraid we would not get the information we wanted.

Q. From Ireland?

A. Yes, so I almost made up my mind I would go to Mr. Russell and ask him if he would be kind enough to let me have one hundred fifty dollars, or thirty pounds, whatever it was, and Mr. Hays, he knew what thirty pounds were in American money. He told me to apply to Mr. Russell. I did not want to go, but I made up my mind to go, so I went to ask Mr. Russell and Mr. Russell was kind enough to give me that money.

Q. What did you do with it?

A. I gave it to Mr. Hays and then I afterwards I learned it was only three pounds that Mr. Collins required, but Mr. Hays mailed a copy of that letter to me and he added the "naught."

Q. Made it thirty? A. Yes, sir.

Q. What other moneys did you get—do you know what he did with that money?

A. I suppose he sent it. He said he sent thirty pounds, but I know he sent but three pounds.

(Testimony of Miss Marie Carrau.)

Q. He did send him the three pounds?

A. Yes, sir.

Q. What other moneys?

A. Mr. Hays got a telegram after they were going to take that testimony in Ireland. He said he was going to Ireland and didn't go. I had nobody to represent me in Ireland.

Q. I don't care about those things—

A. He told me Mr. Collins, he got a telegram from Ireland that he had found a very valuable witness that would show these people were not heirs and they asked for thirty pounds. Well, Mr. Hays was going east. He was always going east—

Q. Get down to the money.

A. Yes, I went to Mr. Russell and he said, "Marie, now, Mr. Hays wants to get money from me from time to time and that I don't like." So he gave me the money and I telegraphed to Mr. Hays I had the money and he was very glad and that money was given to him.

Q. You cashed that money from Mr. Russell and turned it over to Mr. Hays to send to Ireland?

A. Yes, sir.

Q. Do you remember the date?

A. It must have been sometime between September and October, 1902.

Q. Take up the next item of money you secured?

A. I secured money from Mr. Russell for that note owing to Mr. Eben Smith.

Q. Judge Smith?

(Testimony of Miss Marie Carrau.)

A. Yes. That note was six hundred dollars, but Mr. Hays could not pay it and it was discounted. He went to the bank and—

Q. Mr. Smith? A. Yes.

Q. And put the note in the bank?

A. He had that money discounted and it was reduced from six hundred to four twenty-five, and then he went to Mr. Russell and Mr. Hays and told Mr. Russell—when the note was due—no, before this Mr. Hays went to Mr. Russell and asked him if he would not give him that money to pay. Mr. Russell said, "No."

Q. To give Hays the money to pay Mr. Smith?

A. Yes, sir. Only on my account he would not give any more money to Mr. Hays; then he said, "If you can get somebody to go on the note with you, Mr. Hays, I am willing to give you the money."

Q. Mr. Russell talking? A. Yes, sir.

Q. What was done?

A. So I didn't know anything about it and Mr. Hays went to my friends—it seems he had no source but my friends—

Q. To whom? A. Doctor Ames.

Q. He got the money? A. Yes.

Q. And Doctor Ames' note in the bank?

A. Mr. Russell paid that note he told me. He talked and talked and talked to go and settle the note and so I went to Mr. Russell and very kindly he paid that note. I went with him to the bank and at my request he paid the note.

Q. Now, Miss Carrau, who paid for these briefs

(Testimony of Miss Marie Carrau.)

and expenses of the court from time to time as they were incurred and as they were paid?

A. I did.

Q. You paid for all of them?

A. For all of them.

Q. How about the briefs in the Supreme Court of the United States? A. I paid for them too.

Q. You paid for those that were prepared by your lawyers? A. Yes, Judge; yes, sir.

Q. Do you remember when it was you had some disagreement with Mr. Hays and broke off your relations with him?

A. It was when I was in the court. I made up my mind if the case went against me I knew it was not properly handled.

Q. Never mind about that; I want the date.

A. It was when the case was decided and when I found that Mr. Hays was going east.

Q. Mr. Hays was not here when the case was decided in the Circuit Court?

A. No, we were waiting for a decision and he went away.

Q. That was what year now? Have you anything there to refresh your memory, by way of writing? A. It must have been 1902.

Q. Refer to the record. Have you a letter from Mr. Hays that will show?

A. September 16th.

Q. What is the paper you hold in your hand?

A. A letter.

Q. How did you receive it?

(Testimony of Miss Marie Carrau.)

A. By the mail.

Q. Through the mail? A. Yes.

Q. Do you know the writing? A. Yes.

Q. Whose signature? A. Mr. Hays'.

Mr. ROBINSON.—We offer it in evidence. This letter is offered in evidence for the purpose of refreshing the memory of the witness and fixing the date when these relations were broken off between this witness and Mr. Hays. (Exhibit "A.")

Q. Prior to the receipt of the letter which we have now offered in evidence these relations had been broken off between you and Mr. Hays?

A. Yes, sir.

Q. Did Mr. Hays ever have any authority in the matter of incurring costs for you?

Mr. REAVIS.—We object to that as a conclusion.

COURT.—I sustain the objection. The Court will have to decide that in view of the contracts.

Q. Who, if you know, paid for the appeal to the Circuit Court of Appeals? A. I did.

Q. Who paid for the briefs? A. I did.

Q. Do you remember the cost of the transcript on that appeal; have you anything there to refresh your memory?

A. The cost of the transcript to San Francisco it was fifteen hundred dollars and something.

Q. Who paid it? A. I did.

Q. What were the facts with reference to securing that money? Did Mr. Hays secure any portion of it? A. Not one cent; I did.

(Testimony of Miss Marie Carrau.)

Q. Who paid for the printing and briefs and everything of that character? A. I did.

Q. Who paid for the preparation of the transcript from this court to that court? A. I did.

Q. And the printing of the record and briefs?

A. Yes, sir.

Q. If Mr. Hays paid anything in connection with that you didn't know it? A. No.

Q. Then, do I understand you correctly, that all the money that was sent to Ireland, that you ever knew anything about, you secured from your friends? A. Yes, sir.

Q. And all the money that was paid for the court expenses of every character, all secured from your friends? A. Yes, sir.

Q. And turned it over to Mr. Hayes?

A. No.

Q. You paid it directly, most of it?

A. Yes, sir.

Q. What money did you secure and turn over to Mr. Hays? A. I secured—

Q. What about this four hundred and fifty you secured?

A. I called on Mr. Hays and took Mr. Russell to Mr. Hays, in his office, and we telephoned him I needed some money, I wanted some money.

Q. Who telephoned?

A. Mr. Hays. I told Mr. Hays to telephone Mr. Russell that I wanted some money and I knew that Mr. Russell would be glad to let me have it, so we telephoned to him and asked him for two hundred

(Testimony of Miss Marie Carrau.)

and fifty dollars, and Mr. Russell said he would come at once and he did, and I was in the office and Mr. Hays left us, and Mr. Russell said, "I am going to give this two hundred and fifty to you alone."

Q. He said what?

A. "I am going to give the two hundred and fifty dollars for yourself alone. I am going to make that out to you and I don't want you to give a cent to Mr. Hays; I want you to have it for your own use."

Q. He gave it to you?

A. Yes, made the check out to me and then Mr. Hays said I needed somebody to identify me, and we went to the bank together and went back to his office, and then Mr. Hays asked me if I needed all that money at once and I said, "Yes, I do; I need that money very badly." "Well," he said, "can't you spare some of it; I am short of money."

Q. That money was given you by Mr. Russell for you personally and not for costs?

A. No; not for costs at all.

Q. What happened when you got back to Mr. Hays' office with that money?

A. Then he asked me if I wanted all that money at once and I *told yes,* that I wanted it very much; that I needed it. "Well," he said, "can't you spare two hundred dollars for a few days?" I said, "No, I can't do it." "Well," he said, "I am short, a little short. I owe some bills and I would like to have it." "Well," I said, "if you will sure give it back to me in two or three days I will let you have it, but you must be sure at any time I call for it you

(Testimony of Miss Marie Carrau.)

will give it back to me." He said, "Oh, yes, any time, you can get it."

Q. Did you give it to him? A. Yes, sir.

Q. How much?

A. One hundred and fifty dollars.

Q. He got one hundred fifty dollars out of the $250?

A. He wanted two hundred, but I didn't give it to him.

Q. Did he ever pay it back?

A. No. I asked him for the money, but he always asked me for some more. Then another time I gave him twenty-five. I needed it for myself and I came down and asked him to give me back this twenty-five. "Well," he said, "I haven't got it, Miss Carrau."

Q. You heard his testimony this morning with reference to advances of money for clothing and things of that character?

A. That is not true.

Q. You may state whether or not you are indebted to Mr. Hays or ever was indebted to Mr. Hays for any money advanced to you for any purpose whatever? A. Never.

Mr. ROBINSON.—We will offer at this time vouchers and statements from the various clerks and court officers, and other vouchers from other persons and submit them to counsel and ask them to be offered as one exhibit on behalf of the assignee of the judgment, I suppose that is the proper way to designate

(Testimony of Miss Marie Carrau.)

this thing, a hearing of this character. Assignee's Exhibit "B," consisting of four, five, six papers.

(Admitted in evidence as Assignee's Exhibit "B.")

Q. Who was Mr. Russell and what were his relations with you? A. We were great friends.

Q. A friend of your family? A. Yes, sir.

Q. Members of the same church?

A. Yes, knew each other for about fifteen years.

Mr. ROBINSON.—There may be some question, your Honor, with reference to the assignment of this judgment, and I will submit this paper to the witness and ask her if she can identify it and how she received it and from whom, and if she knows the signature, and ask her if it refers to the assignment of that judgment here in dispute, which there is a lien claim with reference to. Ever see that paper?

A. Yes.

Q. How did you receive it?

A. Through the mail.

Q. From whom, from me?

A. Yes, from you.

Q. Does that letter refer to the assignment of this judgment? A. Yes, sir.

Q. And the assignment of some other judgment; what other judgment was that?

A. In the state courts, for the surety company.

Q. It was the case of yourself against the Fidelity & Guaranty Company on the bond that they had given in this court for costs? A. Yes, sir.

Q. And now what happened to that judgment?

(Testimony of Miss Marie Carrau.)

You secured judgment against the bond company and that mentioned the fact that it had been assigned to me; what was done with it?

A. I don't quite understand.

Q. What did I do with the judgment against the United States Fidelity & Guaranty Company—did I collect it? A. Yes, sir.

Q. What did you do with it?

A. I gave some to Mr. Russell.

Q. What did I do with it? I turned it over to you? A. Yes, sir.

Q. And you turned it over to Mr. Russell?

A. Yes, sir.

Mr. ROBINSON.—We offer this in evidence as Assignee's Exhibit "C."

(Admitted in evidence as Assignee's Exhibit "C.")

Mr. HAYS.—Have you the envelope that contained this?

Mr. GODFREY.—I don't think so.

Mr. REAVIS.—You don't seem to have any envelopes for these letters here.

Mr. HAYS.—I wish to ask a question or two. When did you receive this letter?

A. I cannot tell.

Q. Within the last month?

A. It has been more than six months; I think so.

Q. You can look at the letter and refresh your memory. I want to know when you received the letter?

A. How can I tell when I have received so many letters.

(Testimony of Miss Marie Carrau.)

Q. This particular letter I thought possibly your memory might be clear about?

A. I know it was this year.

Mr. HAYS.—I don't see the materiality of the letter. I am perfectly willing to let it go in, but I don't see that it is material in any shape or form.

COURT.—I don't see whether the assignment was made before or after the claim for the lien was filed is material. The relationship of the attorneys in the case is such I don't think either one could claim anything under the principle of innocent purchaser for value received.

Mr. ROBINSON.—That is not our position at all. I merely wish to show in writing the conditions under which I held the judgment, that was all, and this letter stated it. That was the purpose of it.

COURT.—The day when it was written or received is immaterial.

Mr. HAYS.—I withdraw any objection, then.

COURT.—Let it go in.

Q. (Mr. ROBINSON.) You received this letter somewhere near the time it was written, or dated?

A. The same day or next day. I think I could find the envelope.

Mr. ROBINSON.—Never mind. I submit to the witness this document and ask if she ever saw it before and how she received it if she did receive it?

A. Yes, I received it.

Q. Is that the commission mentioned by Mr. Hays with reference to which money was cabled to Ireland?

A. Yes.

(Testimony of Miss Marie Carrau.)

Mr. ROBINSON.—That is all right; we will withdraw that.

Mr. HAYS.—You don't offer that?

Mr. ROBINSON.—No.

Mr. ROBINSON.—I submit a paper writing to the witness and ask her if she ever saw it before and how she received it, if she did receive it.

Mr. HAYS.—No objection, only it is immaterial.

Mr. ROBINSON.— We offer it in evidence, being a letter from the clerk of the Supreme Court of the United States under date of July 3, 1905.

COURT.—Let it go in subject to the objection, the same as the other papers.

Q. You did not receive any money from Mr. Hays for the costs of the litigation in the Federal Court?

A. Not at all.

Q. You secured all the money from your friends and pledged yourself to pay it back out of the estate?

A. Yes.

Q. With certain bonuses?

A. I didn't give any bonus except one party.

Q. The four hundred fifty dollars which you got of Mr. Russell went in payment in part of the money that was paid to Eben Smith, which Mr. Hays claims as a lien? A. Yes.

Q. And the balance of that you paid how?

A. I don't understand what you mean?

Q. I will make it plain. You owed Mr. Smith, the Commissioner, six hundred dollars for taking the testimony? A. Yes, sir.

Q. And Mr. Russell paid all that, didn't he? He

(Testimony of Miss Marie Carrau.)

paid the note of Ames and he paid the difference between the note of Ames and what was going to Mr. Smith?

A. Four hundred twenty-five, or whatever it is, four hundred and something.

Q. How was the other paid?

A. It was not paid at all, Mr. Eben Smith lost.

Q. The difference between six hundred and something and the four hundred twenty-five which Mr. Russell paid?

A. As I understand it; I may be mistaken about it, but I understood it he discounted it. I went to Mr. Smith and he told me he had discounted. Before I think Mr. Hays had got Mr. Eben Smith to make it cheaper and then I went to inquire about it and Mr. Smith said he needed the money and he went to the bank and they discounted it for him.

Q. Then Mr. Russell's money paid that debt, whatever it was? A. Yes.

Q. Do you know how much the note of Ames was, what the face of it was?

A. Four hundred and something.

Q. Wasn't the note put up for all the amount that was owing to Mr. Smith? A. Yes.

Q. Whatever it was the note covered it?

A. Yes.

Q. And then Mr. Smith discounted the note and Mr. Russell only had to pay what the bank had actually paid on the note? A. Yes.

(Testimony of Miss Marie Carrau.)

Cross-examination.

Q. (Mr. HAYS.) Miss Carrau, you will excuse me when I remark that you don't fully understand the English language at all times and can hardly make yourself understood by others; in other words, your conversation nearly always is French at home with your brother and your sisters and it is sometimes hard for you to understand even under the most favorable circumstances the English language. Now, at the time you understood that I was to pay Collins thirty pounds for an affidavit, just a little affidavit he was to make; now, if I had told you it was, not thirty shillings, but thirty something that makes five dollars, or three pounds, now, what would that English money be that makes fifteen dollars, it is thirty something, what can that be?

A. But I have a copy of that letter; it was thirty pounds.

Q. Is it not possible that whoever copied the letter might have copied it wrong—how is that copied, is it in typewriting? A. Typewritten.

Q. If that was written in type I would know nothing about it, would I? If I gave a letter to a party to copy for me and they copied it in type and they say pounds instead of shillings, instead of something else, would I be to blame?

A. You told me it was thirty pounds that were to be sent to Mr. Collins and you sent me to Mr. Russell to get the thirty pounds.

Q. If you find Mr. Collins has receipted to me for

(Testimony of Miss Marie Carrau.)

thirty pounds would that not be possibly that that was the time?

A. You sent one for thirty pounds to Mr. Collins. You sent money to Mr. Collins twice.

Q. Whatever this measure was, I can't name it, but it was thirty something, I may have thought it was pounds.

A. I don't mean that you said it on purpose, but those are the facts.

Q. I want you to be clear about that. I wanted to give you that thirty something, whatever it is, and if the stenographer has copied that thirty pounds it is evidently a mistake. Now, Miss Carrau, with reference to the payment of all of the expenses to the Circuit Court of Appeals, the briefs there, if you were shown that the only brief filed in the case was prepared by myself and printed by printers here and the receipt which I introduced here to-day for one hundred seventeen dollars at that time you and I we were not communicating back and forth and you did not give me any money then, did you? A. No.

Q. So I must have paid it, must I not, myself?

A. I don't know anything about that.

Q. You never, in fact, knew there was a brief filed in that case, except the one Mr. Robinson filed?

A. That is all.

Q. If it should turn out that after the argument at San Francisco, after Mr. Robinson had read my brief to the Circuit Court down there and got leave to file a further and additional one and you paid for

(Testimony of Miss Marie Carrau.)

that, that will explain your idea about paying for briefs, in fact you paid for that brief?

A. I know I had to pay two dollars seventy-five cents for the mistakes you made in the brief, because the brief was in such bad shape; I don't know who made it.

Q. Two dollars and seventy-five cents to make the correction of some error.

A. I don't know; I may be mistaken about it now.

Q. Was that after the argument had been made in San Francisco? A. I could not tell you that.

Q. Miss Carrau, you recall the circumstance of your sisters—understand, I believe what you say is absolutely true in every particular and I don't question your truth for a moment, as you understood it and saw it, but the idea I want to get before your mind are the material facts; do you recall the circumstance of one day very shortly after you came to me and after we made our arrangement, about it being necessary, that you were grieving and it was proper you should have mourning and dark veils, and that it was proper; do you remember about that conversation?

A. I always had a black dress in my wardrobe; always I had a black dress.

Q. Do you recall this conversation that was had between you and your sister and your brother in which I thought it would be proper, and you would naturally be an object of scrutiny—people would be looking at you and wondering about you, why, if you were grieving, as you were manifestly, about the

(Testimony of Miss Marie Carrau.)

death of Mr. Sullivan, why you would not robe yourself in mourning, and at the time you didn't have the money to do so, you said, and I asked you how much it would cost and you said you thought about ten dollars, and that at that time I offered you the ten dollars and you said that you wanted it for your sisters also; that would make thirty dollars and you recall I offered to give you the thirty dollars?

A. I was dressed in black at the time Mr. Sullivan died and besides, I never bought dresses for my sisters. I wore black before that.

Q. I realize it has been a long time since then.

A. My sister was never in your office but once, and that time she testified as to what she knew, and she has never been in your office since.

Q. Your married sister?

A. She never was there but once; she didn't like to go there.

Q. At the time you spoke of that you let me have this one hundred and fifty dollars as you remember. My memory is it was one hundred and twenty-five, it may be one hundred and fifty, but that was very shortly after we started in wasn't it?

A. Quite a while.

Q. Wasn't that the first advance Mr. Russell made?

A. Yes. It was quite a while; at least three months.

Q. Did I sign the note; do you remember?

A. No, he gave me a check.

(Testimony of Miss Marie Carrau.)

Q. Didn't you execute to him a note for the two hundred and fifty?

A. Much later and then we had to sign when you wanted more money.

Q. Not at that time? A. No.

Q. You are sure?

A. As far as my recollection is.

Q. If Mr. Russell should produce the note of two hundred and fifty signed by me, then of course your recollection would be wrong?

A. Yes, but it was not on that day we signed it: we might have signed it later.

Q. I would like to know about this letter which contains the figure thirty. I might have said thirty pounds, but unquestionably it was thirty something, but not thirty pounds?

A. But you said to me thirty pounds and I then said the same thing to Mr. Frater.

Q. Possibly I did. I know I sent Mr. Collins thirty pounds at one time, Mr. Donogan thirty pounds, and Mr. Collins altogether two hundred and fifty dollars. Well, Miss Carrau, when you wrote this letter telling me of your grievance you had against me, I was in the east; who wrote that letter for you? A. I did.

Q. Did you write it?

A. I wrote the letter; yes.

Q. Was it not a typewritten letter?

A. I wrote to you a long letter before that.

Q. Wasn't the letter in which I was to be discharged from your employ in typewriting?

(Testimony of Miss Marie Carrau.)

A. I wrote you a long letter telling you about my troubles.

Q. Were they not enclosed in the same envelope?

A. Maybe it was; I would not say it was.

Q. If there was a typewritten letter—dismissal, who wrote that, who dictated that?

A. I did write it, and as far as my recollection is, Mr. Combs took it to some stenographer to have it typewritten.

Q. If that writing would show it was written by a machine that was identical with letters that had been written upon another typewriting machine, and the date was written in ink and not written by the typewriter, would it not be possible that might have been written by Mr. Robinson?

A. That was not written by Mr. Robinson, I know it.

Mr. HAYS.—I am glad of that.

Redirect Examination.

Q. (Mr. ROBINSON.) It is a fact that Judge Houser and myself absolutely refused to have anything to do with your troubles with Mr. Hays?

A. Indeed, that is right.

Q. You got this money to pay for the appeal to the Circuit Court of Appeals largely from your friends, in connection with Judge Dore?

A. Yes.

Q. And Judge Dore paid your printing bills for these briefs?

A. He had them printed and I gave him the money.

(Testimony of Miss Marie Carrau.)

Q. (Mr. GODFREY.) Did Mr. Russell, during the first stages of this case, did Mr. Russell ever complain of the management of Mr. Hays?

A. Yes; he wanted me to have other lawyers; because he didn't say very kind things of Mr. Hays.

Q. Can you recall what Mr. Russell said at that time?

COURT.—I don't think that has any bearing.

Mr. GODFREY.—I withdraw the question.

[Proceedings Concerning Assignment of Judgment, Submission of Case, etc.]

Mr. ROBINSON.—There is no question here about the assignment of the judgment or anything of that character?

Mr. HAYS.—None whatever.

Mr. ROBINSON.—We submit the case, as far as we are concerned.

Mr. HAYS.—I simply want to contradict a statement as a witness. The statement that I have gotten this money from Mr. Russell with the understanding that it should be used as a personal loan; I think that Miss Carrau made a mistake in that, and I would like to have for that purpose the testimony of Mr. Russell. I would like on that point to further examine Mr. Russell, because I think Miss Carrau has forgotten about that. It is a long time ago and it is not unreasonable or unnatural that she should. It is not very material but it goes to this point: That Mr. Russell at all times from the time he commenced the payments and conferred with me as to the prob-

ability of her winning and would furnish money if I stood back of her and agreed it would be paid, and I told him I would do it independent of whether we succeeded or failed. I would like to have Mr. Russell recalled for the purpose of contradicting the positive statement made by Miss Carrau upon the question of the manner in which these payments were made; all of them, and especially the two hundred and fifty testified to.

COURT.—I think Mr. Russell's statement contained all that is material.

Mr. HAYS.—I agree with the Court, only I felt I would like to have counsel and the Court know exactly the facts about the whole transaction and Miss Carrau's memory is not clear on that, and I excuse that because of her lack of knowledge of the language. I do not think there is a bit of question about her truth. She would not vary the truth for the world, and I know it.

COURT.—I will go through these vouchers and give my decision in writing.

And in addition to the foregoing proceedings at the trial reference is hereby made to the various exhibits introduced in evidence as mentioned therein and said exhibits are made a part of this proceeding and a part of said evidence, and with such exhibits made a part thereof, the assignee of said judgment and as the stakeholder and trustee of said funds presents the foregoing as a bill of exceptions, being the proceedings at the trial of the question as to the validity, etc., of said lien claim in this case, and prays that the same may be settled, allowed, signed and

certified by the Judge of this court, as provided by law and the rules of the above-entitled court.

Dated at Seattle, Washington, March 28, 1910.

JAMES J. GODFREY and
J. W. ROBINSON,

Solicitors for the Assignee and Stakeholder of the Funds derived from the Collection of said Judgment for Costs Herein et al.

[Certificate to Bill of Exceptions and Proceedings.]

United States of America,
District of Washington,
Western Division,—ss.

The foregoing Bill of Exceptions was presented to the undersigned, Judge of the above-entitled court, who was present and presiding throughout the trial of all the proceedings referred to in the foregoing Bill of Exceptions, being the proceedings at the hearing as to the validity, etc., of the lien claim of W. F. Hays herein against the judgment for costs entered herein, and all the proceedings referred to in the foregoing Bill of Exceptions, and this Bill of Exceptions being, within the time fixed by the rules and order of this Court, duly filed and no exceptions having been filed thereto within the time allowed, and said Bill of Exceptions and proceedings are hereby certified to be true and to be the Bill of Exceptions and proceedings at the trial, and the whole thereof, in the above-entitled proceeding for the summary determination of said lien claim.

Dated March 31st, 1910.

C. H. HANFORD,
Judge.

We hereby admit service of the foregoing Bill of Exceptions and proceedings at the trial of the questions relating to the lien claim of W. F. Hays.

Dated March 31st, 1910.

W. F. HAYS,
CHARLES T. HUTSON,
For W. M. Russell.

[Endorsed]: Bill of Exceptions as Settled and Allowed. Filed U. S. Circuit Court, Western District of Washington. Mar. 31, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

Proof of Service [of Petition for Appeal, etc.].

United States of America,
Western District of Washington,
Northern Division.

P. L. Burns being duly sworn, on oath says: That he is a citizen of the United States over the age of twenty-one years, not a party to the above-entitled

action and competent to be a witness therein; that he did on the 3rd day of March, 1910, personally serve the attached petition for appeal, order allowing appeal and fixing cost and supersedeas bond and notice of hearing thereof upon W. F. Hays by delivering to and leaving with the said W. F. Hays, personally, in the city of Seattle, county of King, State of Washington, a true copy of each thereof; and upon W. M. Russell by delivering to and leaving with C. T. Hutson, attorney herein, for W. M. Russell, personally, at his office in the city of Seattle, county of King, State of Washington, a true copy of said petition, orders and notice and each thereof on the 4th day of March, 1910.

P. L. BURNS.

Subscribed and sworn to before me this 5th day of March, 1910.

J. W. ROBINSON,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Petition for, and Order Allowing Appeal, etc.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

PETITION FOR APPEAL FROM THE ORDERS AND JUDGMENT OF THE COURT ESTABLISHING THE LIEN CLAIM OF W. F. HAYS AGAINST THE JUDGMENT HEREIN; AND ORDER ALLOWING APPEAL AND FIXING COST AND SUPERSEDEAS BOND.

Now comes J. W. Robinson, the assignee of the judgment herein and stakeholder and trustee of the funds secured by the satisfaction on execution issued herein for the collection of said judgment, and feeling himself aggrieved by the final orders made and entered herein with reference to said lien claim of W. F. Hays on January 24th and 25th, 1910, and on February 28, 1910, whereby the funds were ordered distributed to Russell, et al., with accrued interest, etc., and the said Robinson, as the assignee of said

judgment and the stakeholder and trustee of said funds, for himself and all those interested in said fund and its distribution, does hereby appeal from said final order and from the various orders entered in said cause with reference to the establishment of said lien and the disbursement of said funds, materially affecting the rights of this assignee as stakeholder and trustee of said fund, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors, which is filed herewith, and he prays that this, his petition for said appeal, may be allowed and that a transcript of the record proceedings and papers relating to said lien claim upon which said final order and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and your petitioner further prays that an order be made herein fixing the amount of security to be given or furnished for said appeal, as a cost and supersedeas bond, and that the same be superseded.

JAMES J. GODFREY and
J. W. ROBINSON,
Solicitors for said Assignee et al.

The foregoing petition for appeal is granted and the appeal allowed.

It is further ordered that the costs and supersedeas bond herein on such appeal is fixed at the sum of one thousand dollars, which bond when conditioned as provided by the rules of the Circuit Court of Appeals shall be a cost and supersedeas bond on appeal in this action, and upon its being approved by the

Judge of this court, the said W. M. Russell is directed and required to repay into the registry of this court the sum of one thousand seven hundred ninety dollars, and the said W. F. Hays the sum of four hundred ninety-six and 33/100 dollars, withdrawn from the registry of this court under the order of the Court as to distribution from which this appeal is taken.

Done in open court this March 28th, 1910.

C. H. HANFORD,
Judge.

Hays takes exception—allowed.

C. H. HANFORD,
Judge.

Filed U. S. Circuit Court, Western District of Washington. Mar 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

Assignment of Error.

Come now the solicitors for the assignee herein and file herewith assignment of error in the proceed-

ings to establish the lien claim of W. F Hays, which assignment of error is attached to and made a part of the petition for appeal filed herein from the orders and judgments rendered herein with reference to said lien claim of the said Hays, establishing the same and fixing the manner in which the fund held by the said Robinson in the registry of the court is to be distributed, and all orders entered herein affecting the same and affecting the substantial rights of the said assignee of said judgment, alleging that each of the orders and judgments entered herein with reference to that subject matter in this cause are erroneous in the following particulars, to wit:

1. The Court erred in holding and in entering the order determining that the lien claim of the said Hays was a valid claim against said judgment or the funds arising from the enforcement of the execution herein, and for the reason that said pretended lien claim was not in form or substance as required by statute and was not a valid lien or claim against said judgment or said funds.

2. That the Court erred in holding there was anything due the said Hays by way of money advanced or for which he stood as the guarantor to Marie Carrau to make her defense in this action and erred in holding that the testimony submitted in support thereof was sufficient either to establish said lien or to determine the amount or any amount thereunder as constituting said lien.

3. The Court erred in determining any question whatever with reference to the amount of money W. M. Russell had advanced or that he had any lien un-

der the Hays lien claim for any part thereof, and erred in holding that the said Russell was before the Court for any purpose whatever with reference to said lien claim, and the Court erred in directing that any portion of said funds should be distributed to the said Russell or to the said Hays, and in not holding that said lien was invalid and not a compliance with the statute even in the event that the said Hays had a valid lien against said judgment or funds, and erred in entering any order whatever to distribute said funds or any portion thereof while other persons claiming to have advanced money to the said Carrau to make her defense in this cause should hold an equitable lien against said funds pro rata together with the said Russell and the said Hays, if either thereof had advanced money to Carrau to make her defense herein.

4. The Court erred in refusing to hear the petition on behalf of the said Robinson as assignee, stakeholder and trustee of said judgment and funds, and in not making an order distributing the whole of said funds equitably between all the persons who had furnished money to the said Carrau in order to make her defense in this main action which was shown in the testimony submitted in support of and in opposition of and to the Hays alleged lien claim.

JAMES J. GODFREY and
J. W. ROBINSON,
Solicitors for said Assignee, Stakeholder and Trustee of said Judgment, et al.

[Notice of Presentation of Petition for Appeal, etc.]

To W. M. Russell and to His Solicitors, Robert Lindsay and C. T. Hutson, and to W. F. Hays and to His Solicitor, J. B. Reavis:

You and each of you hereby take notice that the foregoing petition for appeal and for an order fixing the cost and supersedeas bond, together with said assignment of error, will be presented to the Judge of the above-entitled court at the Federal Court Building at Seattle, Washington, on March 7, 1910, at the opening of court at 10 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, and that we will then and there petition the Court as therein indicated.

Dated at Seattle, Washington, March 3, 1910.

JAMES J. GODFREY and
J. W. ROBINSON,
Solicitors for Petitioner, etc.

We hereby accept due and timely service of the foregoing petition for allowance of appeal, order fixing bond, assignment of error and notice of hearing, this March 3, 1910.

_____,
Solicitors for W. M. Russell.

[Endorsed]: Order allowing appeal and fixing bond at $1,000. Filed U. S. Circuit Court, Western District of Washington. Mar. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Endorsed]: Petition for Appeal, Order Allowing Same and Fixing Bond and Supersedeas, Assign-

ment of Error and Notice of Hearing. Filed U. S. Circuit Court, Western District of Washington. Mar. 7, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Notice of Filing of Cost and Supersedeas Bond on Appeal.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

In the Matter of the Distribution of Funds Under Lien Claim of W. F. HAYS.

To W. M. Russell and to W. F. Hays:

You are hereby notified that J. W. Robinson has filed in this court in the above-entitled proceedings a cost and Supersedeas Bond on Appeal in the sum of $1,000, this day approved by the Judge of the court.

Dated at Seattle, March 31, 1910.

W. D. COVINGTON,

Clerk.

[Endorsed]: Notice of Filing Bond. Filed U. S. Circuit Court, Western District of Washington.

Mar. 31, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, as Administrator, etc., and MARIE CARRAU,

Respondents.

Bond on Appeal.

Know all Men by These Presents: That we, J. W. Robinson, as the assignee of the judgment herein, appellant, as principal, and Fidelity and Deposit Company of Maryland, as sureties, acknowledge themselves to be jointly and severally held and firmly bound unto W. M. Russell and W. F. Hays, and to each of them, in the full sum of One Thousand Dollars, lawful money of the United States, for which payment well and truly to be made we jointly and severally bind our and each of our heirs and successors by these presents.

Dated at Seattle, Washington, March 29, 1910.

Now, the condition of the foregoing obligation is such, that whereas, in the above-entitled court and cause a final order was rendered and entered herein in favor of the said Russell and the said Hays di-

recting a distribution of the funds in the registry of the court paid in upon a judgment in favor of Marie Carrau and against the complainants and thereafter assigned to the said Robinson, and which order was made and entered herein January 25, 1910; and

Whereas, an appeal from such order has been taken to the United States Circuit Court of Appeals for the Ninth Circuit by the said Robinson.

Now, therefore, if the said principal and appellant shall prosecute said appeal to effect and pay all damages and costs if he fail to make good his plea, then the above obligation shall be void; otherwise to remain in full force and effect, and the said sureties consent and agree that in case of any breach in the conditions of this obligation the said Circuit Court may upon notice of not less than ten days proceed summarily in the suit in which said bond is given to ascertain the amount which we are bound to pay on account of such breach and render judgment therefor against each and award an execution therefor.

[Seal] J. W. ROBINSON,
Principal.

FIDELITY AND DEPOSIT CO. OF MARYLAND.
By WALTER C. McKAY,
Attorney in Fact.

Attest: A. W. WHALLEY,
Agent.

The foregoing bond is hereby approved this March 31, 1910.

C. H. HANFORD,
Judge.

We hereby accept due and timely service of the foregoing bond this March ——, 1910.

———————.

[Endorsed]: Bond on Appeal. Filed U. S. Circuit Court, Western District of Washington. Mar. 31, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Objections to Granting of Petition for Appeal, etc.]

In the Circuit Court of the United States, Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAGHAN, EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

OBJECTIONS TO THE PETITION FOR APPEAL AND FIXING SUPERSEDEAS BOND, ETC.

Comes now W. F. Hays, in Propria persona, specially appearing for the purpose, and none other, of objecting to the granting of the petition for appeal herein of J. W. Robinson and to fix supersedeas bond, etc., for the following reasons:

1. Because the decision and orders of this Court sought to be appealed from and superseded, entered on the 6th day of July, 1908, and on the 18th day of

November, 1909, and on the 28th day of January, 1910, and each of them were upon and in pursuance to the petition of the said J. W. Robinson, and said orders and each of them are non-appealable and the said Robinson is bound thereby.

2. That the order of January 28, 1910, directing the clerk of this court to pay out of the money so ordered was self-executing and supersedeas will not lie and is unauthorized in law.

3. That the judgment or order sought to be appealed from has been in all things fully executed and discharged, and this Honorable Court is without power or jurisdiction to grant appeal therefrom or fix a supersedeas bond therein.

4. That the appeal now sought by said Robinson as "Trustee" when the record discloses no such relationship existing, is an attempt on his part to read into the record a relationship not existing and not disclosed by the record.

The foregoing objections and each of them are based upon the records and files in said cause.

W. F. HAYS,
In Propria Persona.

[Endorsed]: Objections to the Petition for Appeal and Fixing Supersedeas Bond, etc. Filed U. S. Circuit Court, Western District of Washington. Mar. 28, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

United States Circuit Court for the District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN et al., and J. W. ROBINSON, Assignee,

Respondents.

Order Extending Time to Docket Case on Appeal.

Now, on March 31st, 1910, it appearing to the Court that the record of this action on appeal to the United States Circuit Court of Appeals cannot be prepared or certified within the time required by the citation, to wit, April 30, 1910, and it appearing to the Court that this appeal cannot be heard before the September term of said U. S. Circuit Court of Appeals and at Seattle, Washington, 1910, and upon application of the appellant, and the Court being advised,—

It is ordered that the time be and the same is hereby extended until June first, 1910, in which to prepare and certify said record.

Dated March 31st, 1910.

C. H. HANFORD,
Judge.

[Endorsed]: Order Extending Time to Docket Case on Appeal. Filed U. S. Circuit Court, West-

ern District of Washington. Mar. 31, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

In the Matter of Establishing the Lien of *F. W.* HAYS and Distribution of Funds.

Citation [on Appeal (Copy)].

United States of America, to *F. W.* Hays and W. M. Russell, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, within thirty (30) days from date of this Citation, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein J. W. Robinson, as assignee of the judgment in the foregoing entitled action entered therein against the complainants and in favor of Marie Carrau, and by her

assigned to Robinson, wherein W. F. Hays and W. M. Russell are appellees and J. W. Robinson, as assignee, is appellant, to show cause, if any there be, why the Judgment and Orders in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this March 31st, 1910.

[Seal] C. H. HANFORD,
Judge.

Copy of the within Citation received this March 31, 1910, at Seattle, Washington.

CHARLES T. HUTSON,
Attorney for W. M. Russell.
W. F. HAYS,
In Propria Persona.

[Endorsed]: Citation. Filed U. S. Circuit Court, Western District of Washington. Mar. 31, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Praecipe for Transcript of Record.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAGHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Defendants.

In the Matter of the Lien Claim of W. F. HAYS and W. M. RUSSELL.

To the Clerk of the Above-entitled Court, Seattle, Washington.

Sir: I will desire the following records on appeal in this proceeding from the judgment of the Court establishing the Hays-Russell lien herein, to wit:

The judgment in favor of Marie Carrau, filed Aug. 7, 1905.

Assignment of judgment to J. W. Robinson, filed Mar. 26, 1908.

Memorandum Decision of Court, filed July 6, 1909.

Petition of J. W. Robinson for distribution of proceeds, filed Dec. 17, 1909.

Motion to strike petition of J. W. Robinson, filed Dec. 23, 1909.

Motion to reconsider Memorandum Decision, filed Jan. 21, 1910.

Order Distributing Costs, filed Jan. 24, 1910.

Motion on Affidavit of J. W. Robinson for Order to Show Cause, filed Jan. 28, 1910.

Order to Show Cause, filed Jan. 28, 1910.

Notice to prepare findings, etc., on decree in accordance with Decision, filed July 6, 1909.

Petition of R. J. Ferguson et al., to be allowed to intervene in re distribution of funds, filed Feb. 24, 1910.

Special appearance of Reynolds, Ballinger & Hutson for W. M. Russell, filed Feb. 28, 1910.

Order denying petition of intervenors, filed Feb. 28, 1910.

Order denying request for findings, filed Feb. 28, 1910.

Order granting supersedeas and requiring return of funds, filed Feb. 28, 1910.

Order granting motion to strike petition of J. W. Robinson to distribute funds pro rata, filed Feb. 28, 1910.

Filed Petition for Appeal, Assignment of Errors and Proof of Service, filed March 7, 1910.

Order allowing appeal; fixing bond at $1000 and for return of money into court (attached to petition), filed Mar. 28, 1910.

Bond on Appeal, filed March 31, 1910.

Notice by clerk to W. F. Hays and W. M. Russell of filing of Bond for $1000, filed March 31, 1910.

Objections to petition for appeal and fixing supersedeas bond, filed on March 28, 1910.

Citation, filed March 31, 1910.

Order extending time to docket cause in Circuit Court of Appeals to June 1st, 1910, filed March 31, 1910.

Praecipe for Transcript of Record, filed April 6, 1910.

Bill of Exceptions and proceedings at trial of the establishment of the lien claim of W. F. Hays herein, as settled and filed March 31, 1910.

Yours respectfully,

J. W. ROBINSON,

J. J. GODFREY,

Solicitors for Robinson.

[Endorsed]: Praecipe. Filed U. S. Circuit Court, Western District of Washington. Apr. 6,

1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Appellants,

vs.

HANNAH O'CALLAGHAN and EDWARD CORCORAN,

Appellees.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby certify the foregoing one hundred and thirty-two (132) typewritten pages, numbered from 1 to 132, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of solicitor for appellants, as the same remain of record and on file in the office of the clerk of the said court, and that the same constitute the record on appeal from the order, judgment and decree of the Circuit Court of the United

States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of $86.80. and that the said sum has been paid to me by J. W. Robinson, Esquire, solicitor for appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 9th day of May, 1910.

[Seal] A. REEVES AYRES,
Clerk.

By W. D. Covington,
Deputy Clerk.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN and EDWARD CORCORAN,
Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,
Respondents.

In the Matter of Establishing the Lien of *F. W.* HAYS, and Distribution of Funds.

Citation [on Appeal (Original)].

United States of America, to *F. W.* Hays and W. M. Russell, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, within thirty (30) days from date of this citation, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein J. W. Robinson, as assignee of the judgment in the foregoing entitled action entered therein against the complainants and in favor of Marie Carrau, and by her assigned to Robinson, wherein W. F. Hays and W. H. Russell are appellees and J. W. Robinson, as assignee, is appellant, to show cause, if any there be, why the judgment and orders in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this March 31st, 1910.

[Seal] C. H. HANFORD,
Judge.

Copy of the within Citation received this March 31st, 1910, at Seattle, Washington.

CHARLES T. HUTSON,
Attorney for W. M. Russell.
W. F. HAYS,
In Propria Persona.

[Endorsed]: Original. No. 943. In the Circuit Court of the United States for the Western District of Washington, —— Division. Hannah O'Callahan and Edward Corcoran, Complainants, vs. Terrence O'Brien, Adm., etc., and Marie Carrau. Filed U. S. Circuit Court, Western District of Washington. Mar. 31, 1910. Citation. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

Service of papers in this case may be made upon McCafferty, Robinson & Godfrey, Attorney— for ————, at No. 902 Lowman Bldg., Room ——, Seattle Block, Washington.

[Endorsed]: No. 1861. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Robinson as Assignee of a Certain Judgment Entered in the Circuit Court of the United States for the Western District of Washington, Northern Division, in the Cause Entitled Hannah O'Callaghan and Edward Corcoran, Complainants, vs. Terrence O'Brien, as Administrator of the Estate of John Sullivan, Deceased, and Marie Carrau, Defendants, Appellant. vs. W. F. Hays and W. M. Russell, Appellees. In the Matter of the Establishment of a Certain Lien Claim of W. F. Hays, etc. Transcript of Record. Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Filed May 31, 1910.

F. D. MONCKTON,
Clerk.

NO. 1861

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. W. ROBINSON, as Assignee of a Certain Judgment Entered in the Circuit Court of the United States for the Western District of Washington, Northern Division, in the Cause Entitled HANNAH O'CALLAGHAN and EDWARD CORCORAN, Complainants, vs. TERRENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU, Defendants,

Appellant,

vs.

W. F. HAYS and W. M. RUSSELL,

Appellees.

In the Matter of the Establishment of a Certain Lien Claim of W. F. HAYS, etc.

SUPPLEMENTAL TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,

Complainants,

vs.

TERRENCE O'BRIEN et al.,

Respondents.

Order [Permitting Appeal Expenses to be Charged Against Registry Fund].

The appeal herein relating to the validity of the lien of W. F. Hays having been perfected and the estimate of the costs in preparing the record on appeal to the United States Circuit Court of Appeals having been fixed by the Clerk at eighty-six and 80/100 dollars ($86.80), and it appearing to the satisfaction of the Court that there is no reason why the funds in the registry of the court, having been determined to belong to J. W. Robinson as assignee of said judgment, should not be used by said appellant in payment of the expenses of such appeal,—

It is now therefore ordered that the Clerk of this Court apply such portion of said funds now in the registry of the Court belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal and to charge said fund with such amounts.

Dated at Seattle, Washington, May 10th, 1910.

C. H. HANFORD,

Judge.

[Endorsed]: Order. Filed U. S. Circuit Court, Western District of Washington. May 10, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Certificate of Expenses Paid from Registry Fund.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

HANNAH O'CALLAHAN et al.,
Complainants,

vs.

TERRENCE O'BRIEN et al.,
Respondents.

J. W. ROBINSON, Assignee,
Appellant,

vs.

W. F. HAYS et al.,
Appellees.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the U. S. Circuit Court for the Western District of Washington, Northern Division, do hereby certify that I paid from the registry of the Court at the request of J. W. Robinson, Solicitor for Appellant, and in conformity with an order of Court of May 10, 1910, the following sums incident to the appeal in the above-entitled cause:

Clerk's costs, U. S. Circuit Court.....$122
Clerk's costs, U. S. Circuit Court of Appeals 197 $319

And that the amounts so expended were a part of the funds determined to belong to J. W. Robinson, by the order of Court of January 24, 1910.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 11th day of June, 1910.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

United States Circuit Court for the Western District of Washington.

No. 943.

HANNAH O'CALLAGHAN et al.,
Complainants,
vs.
TERRENCE O'BRIEN et al.,
Defendants.

Praecipe [for Supplemental Record].

To the Clerk of the Above-entitled Court:

You will please prepare supplemental record on appeal and include therein, Order of May 10th, 1910, on file in said cause; and further include therein, a certificate showing the various amounts paid from the registry of said court upon request of J. W.

Robinson in conformity with said order, and the dates of such payments, and certify same to United States Circuit Court of Appeals for Ninth Circuit.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for W. M. Russel.

[Endorsed]: Praecipe for Process, etc. Filed U. S. Circuit Court, Western District of Washington. Jun. 7, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 943.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Appellants,

vs.

HANNAH O'CALLAGHAN and EDWARD CORCORAN,

Appellees.

Certificate of Clerk U. S. Circuit Court to Supplemental Record.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the Western District of Wash-

ington, do hereby certify the foregoing three (3) typewritten pages, numbered from 1 to 3, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of Attorney for Appellees, as the same remain of record and on file in the office of the Clerk of said Court.

I further certify that the cost of preparing and certifying the foregoing is the sum of $2.30, and that the said sum has been paid to me by C. T. Hutson, Esquire, Attorney for Appellees.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 11th day of June, 1910.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

[Endorsed]: No. 1861. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Robinson, as Assignee of a Certain Judgment Entered in the Circuit Court of the United States for the Western District of Washington, Northern Division, in the Cause Entitled Hannah O'Callaghan and Edward Corcoran, Complainants, vs. Terrence O'Brien, as Administrator of the Estate of John Sullivan, Deceased, and Marie Carrau, Defendants,

Appellant, vs. W. F. Hays and W. M. Russell, Appellees. In the Matter of the Establishment of a Certain Lien Claim of W. F. Hays, etc. Supplemental Transcript of Record. Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Filed June 14, 1910.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

NO. 1861

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. W. ROBINSON, as Assignee of a Certain Judgment Entered in the Circuit Court of the United States for the Western District of Washington, Northern Division, in the Cause Entitled HANNAH O'CALLAGHAN and EDWARD CORCORAN, Complainants, vs. TERRENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU, Defendants,

Appellant,

vs.

W. F. HAYS and W. M. RUSSELL,

Appellees.

In the Matter of the Establishment of a Certain Lien Claim of W. F. HAYS, etc.

ORIGINAL EXHIBITS.

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

[Certificate of Clerk U. S. Circuit Court to Original Exhibits.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

HANNAH O'CALLAHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,

Respondents.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the original exhibits introduced and used upon the trial of the foregoing entitled cause as follows: "Hays'" Exhibits 1 to 3 and 5 to 21, inclusive. "Robinson's" Exhibits "A," "B," "C" and "D," the said exhibits being transmitted to the United States Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in this cause; these said exhibits being so transmitted pursuant to the order of the Circuit Court made and entered in said cause June 23, 1910, a copy of which order is attached to and made a part of this certificate.

In witness whereof I hereto set my hand and affix my official seal, at Seattle in said District, this 23d day of June, 1910.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

[Order Directing Transmission of Original Exhibits to Appellate Court.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

HANNAH O'CALLAHAN and EDWARD CORCORAN,
Complainants,

vs.

TERRENCE O'BRIEN, Administrator, etc., and MARIE CARRAU,
Respondents.

Now, on this 23d day of June, 1910, upon motion of J. W. Robinson, Esq., Attorney for Complainant and Appellant, and for sufficient cause appearing;

It is ordered that the Clerk of this Court may transmit to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the transcript of the record on appeal in the above-entitled cause, heretofore, to wit, May 9, 1910, transmitted to said Circuit Court of Appeals, the original exhibits introduced and used upon the trial of this cause as fol-

lows: "Hays'" Exhibits 1 to 3 and 5 to 21, inclusive; "Robinson's" Exhibits "A," "B," "C" and "D."

C. H. HANFORD,
Judge.

[Hays' Exhibit No. 1.]

THIS MEMORANDUM OF AGREEMENT WITNESSETH, That

WHEREAS, the late John Sullivan died in the City of Seattle on the 26th day of September, 1900, leaving an estate consisting of money, personal property and real estate estimated to be worth about the sum of Five hundred thousand dollars ($500,000.); and the said John Sullivan prior to his said death, to-wit: on the 25th day of September, 1900, made, declared and published his last will and testament, by the terms of which will he made the undersigned Marie Carrau his sole legatee, and

WHEREAS, it is necessary for the said Marie Carrau in order to assert her right under said will to said decedent's estate, and for the purpose of obtaining the ultimate ownership of said estate, or whatever right, title or interest she may have, or may hereafter have, or decreed to her, it is necessary to employ attorneys, and for such purpose the said, the undersigned Marie Carrau hereby retains and employs as her principal and senior counsel W. F. Hays, attorney at law, and she hereby authorizes and empowers the said W. F. Hays to take such proceedings and prosecute such suit or suits, action or actions, as to him shall seem most proper and expedient under the facts and the law; and the said Marie Carrau

hereby agrees not to employ any other additional or associate counsel or attorney without the written consent and direction of the said Hays, the said Hays to have the sole direction and management of the matters connected with the estate of the said John Sullivan as above indicated, and

I HEREBY AGREE TO PAY to the said Hays as my said attorney a sum of money equal to one-half (½) of whatever sum of money may be obtained for the said Marie Carrau, and a sum of money equal to one-half (½) of whatever sum that may be recovered herein in the form of property, the valuation thereof to be made by the said Hays and the undersigned Marie Carrau by mutual agreement as to said valuation, if agreement thereon is had, and, if not, that the sum may be determined by arbitration as to the amount and value of the property so recovered for the said Marie Carrau, and

IT IS UNDERSTOOD AND AGREED on the part of the said Marie Carrau that she will pay such compensation either in cash or by the execution of a first mortgage upon the property so obtained by her, or that she will execute a deed for the undivided one-half (½) interest in said property when the same shall have been by her obtained.

IT IS FURTHER UNDERSTOOD AND AGREED that the said Marie Carrau shall have the right to employ, with the consent and approval of the said Hays, associate counsel herein, and to pay said associate counsel a sum of money not exceeding 10% of the entire sum of said estate, and when so paid or final settlement shall be made between the

said Marie Carrau and the said Hays that the sum paid out for associate counsel shall be deducted from the sum total of said estate, and the amount payable under the terms of this contract to the said Hays to be bottomed upon the sum remaining after making said deduction for the said associate counsel.

IT IS UNDERSTOOD that whatever costs, fees or charges of the courts in such action or proceedings that may be required or advanced shall be paid by the said Marie Carrau out of said estate, and the sum herein agreed to be paid to the said Hays is to be the one-half (½) of said estate after making said deductions for associate counsel and costs or necessary expenses in the premises.

IN WITNESS WHEREOF we have hereunto set our hands this 7th day of March, 1901, at Seattle, Washington.

MARIE CARRAU.
W. F. HAYS.

[Endorsed on Back:] 943. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 1." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 2.]

Seattle, Wash., Oct. 10, 1900.

THIS MEMORANDUM WITNESSETH that

WHEREAS, the late John Sullivan died in the City of Seattle, on the 26th day of September, 1900, leaving a large estate in money and property, and in which the undersigned, Marie Carrau, is by right and lawfully entitled to inherit the same, or at least a large portion thereof, and

WHEREAS, it is necessary for the said Marie Carrau in order to assert her right to said interest in said decedent's estate it is necessary to prosecute an action at law, or some other proceeding to be taken,

THEREFORE, the undersigned, Marie Carrau, hereby retains and employs W. F. Hays, Attorney at law, to take such proceedings and prosecute such suit or suits, action or actions, as to him shall seem most proper and expedient under the facts and the law, and for such services the said Marie Carrau agrees to pay to the said Hays as attorney's fees a sum of money equal to one-half (½) of whatever sum may be realized by him for her in any such action or proceeding, or by any compromise that may be affected, and this to be compensation in full to the said Hays for such services.

It is understood that whatever costs, fees or charges of the Court in such action or proceeding that may be required to be advanced shall be deducted from the sum so recovered and the sum pay-

able to the said Hays shall be reckoned upon said basis.

It is further understood that said compensation in case of the securing of property that the property to be paid shall be equally divided according to the conditions of this employment by mutual division

This agreement in duplicate.

MARIE CARRAU.
W. F. HAYS.

Witness:

LOUIS DAUSSAT.
ALICE BARTA.

[Endorsed on Back:] #943. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 2." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays'Exhibit No. 3.]

THIS AGREEMENT WITNESSEH: That Whereas the Undersigned Marie Carrau is the sole legatee and devisee of the late John Sullivan, deceased, and is expecting to obtain by judicial proceedings the property of the said estate, and it is necessary to lay out and expend money in the assertion of her rights under said devise, Wherefore, in order to obtain the sum of Four Hundred and Twenty-Five Dollars ($425) from William M. Russell, Esq., the undersigned Marie Carrau, in consideration of such advancement and for the use of said money,

hereby agrees, in case she shall succeed in obtaining said estate or any part thereof, pay to the said William M. Russell the sum of One Thousand Dollars ($1000) and in case she shall fail and not recover any sum of said estate, she agrees hereby to pay back said principal sum of $425 with lawful interest thereon from date until paid, said payment to be due as soon as a final decree awarding, or refusing to award, to the said Marie Carrau her interest in said estate.

IN WITNESS WHEREOF, the parties have hereunto set their hands this seventh day of April, 1902.

MARIE CARRAU.
W. F. HAYS (guarantor).
W. M. RUSSELL.

[Endorsed on Back:] #943. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hay's Exhibit 3." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 5.]

[Billhead of Mensing-Muchmore Company.]

Seattle, U. S. A., Jan. 27, 1903.

Sold to W. F. Hays
Our Order No. B 1584
30 Copies Brief, Carrau Case,.....$117.00

Paid

M. M. CO.,
A. M.

[Endorsed on Back:] 943. #5. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 5." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 6.]

WASHINGTON NATIONAL BANK

U. S. Depositary

Seattle, Washington, Mar. 3, 1902.

Received from W. F. Hays ch. One Hundred Fifty Dollars Account of Cable transfer £30 % to Donegan Lawyer Cork.

THE WASHINGTON NATIONAL BANK
OF SEATTLE,

WM. THAANUM,
Teller.

[Endorsed on Back:] #943. #6. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 6." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 7.]

WASHINGTON NATIONAL BANK OF SEATTLE.

Seattle, Wash., Mar. 3, 1902.

MEMORANDUM CHECK

For 2 Telgs. to N. Y. % Cable to Cork.....$2.00
Exch T/T $150.00 to N. Y..... .75

$2.75

Debit W. F. HAYS.

WASHINGTON NATIONAL BANK OF SEATTLE.

Seattle, Wash., Apr. 7, 1902.

MEMORANDUM CHECK.

For Cost Cable to Dublin £30—%.....$2.50

Debit W. F. HAYS.

[Stamped across face:] Paid.

WASHINGTON NATIONAL BANK OF SEATTLE.

Seattle, Wash., Mar. 10, 1902.

MEMORANDUM CHECK

For Cable to Cork, Ireland 3/4.....$2.50

Debit W. F. HAYS.

[Stamped across face:] Paid.

WASHINGTON NATIONAL BANK

U. S. Depositary

Seattle, Washington, Apr. 7, 1902.

Received from W. F. Hayes One hundred fifty Dollars account of Cable to Collins Solicitor Dublin.

THE WASHINGTON NATIONAL BANK
OF SEATTLE,

THAANUM,
Aud.

[Endorsed on Back:] 943. #7. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 7." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 8.]

[Billhead of McGill & Wallace.]

Washington, D. C., May 4, 1904.

Mr. W. F. Hays

To 40 Copies Brief
"Motion to Dismiss Appeal"
(Case of O'Callahan et al vs.
O'Brien et al."... ..... 5 —

To 40 Copies Brief
"In support of Motion to Dismiss
Appeal"... .... 12 —

To 40 Copies Brief
"In opposition to Motion for
Writ of Certiorari".. ... .. 10 — $27 00

Paid May 21, 1904.

McGILL & WALLACE.

[Endorsed on Back:] #943. #8. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 8." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 9.]

[Billhead of Times Printing Company.]

Seattle, Washington, June 14/07.

Sold to W. F. Hays

424 N. Y. Blk.

Estate John Sullivan

3¾" 4 t wkly May 22 to June 12, 15"
c. 40 ..... $6 00
3¾" 1 t Dly May 22, c. 50..... 1 85 $7 85

Paid 6/17/01.

THE TIMES PRINTING CO.,
EDDY.

[Endorsed on Back:] #943. #9. Filed in the Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 9." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 10.]

DISTRICT OF WASHINGTON.

$25.00 Seattle, Oct. 22, 1901.

Received from W. F. Hays, ~~Proctor~~ Attorney for Marie Carrau, the sum of Twenty-five Dollars on account of default in cause of Hannah O'Callighan et al. vs. Terence O'Brien, No. 934, U. S. Circuit Court.

A. REEVES AYRES,
Clerk.

By A. N. Moore,
Deputy.

~~Referee's Fee.....$10.00~~
~~Clerk's Fee.....$10.00~~
~~Trustee's Fee.....$ 5.00~~

[Endorsed on Back:] #943. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 10." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 11.]

FIFTY-SEVENTH CONGRESS.

JOHN H. MITCHELL, Oregon, Chairman.

Joseph R. Hawley, Conn.
Julius C. Burrows, Mich.
Boies Penrose, Pa.
Charles H. Dietrich, Nebr.
Geo. L. Wellington, Md.

George Turner, Wash.
Charles A. Culberson, Texas.
James P. Taliaferro, Fla.
Alexander S. Clay, Ga.
F. McL. Simmons, N. C.
Harry C. Robertson, Clerk.

Committee on Coast Defenses,
UNITED STATES SENATE,
Washington, D. C.,

May 18, 1904.

W. T. *Hay*, Esq.,
Cambridge, Ill.

Mr. dear Mr. Hays—I have just wired you to Cambridge telling you that the Supreme Court had decided that the motion for Certiorari should go over until the second Monday in October and it and the motion to dismiss the appeal would be taken up and decided together. I have your letter of May 14th. I have already written Miss Carrau in answer to her letter and regret I have not a copy here as I forwarded it to my secretary in Portland. I do not think it wise for me to write any further letter to her, you and she will have to fight the matter out, besides I leave the City tomorrow or the next day for the summer and a letter from you would not reach me.

Very sincerely,
JOHN H. MITCHELL.

[Endorsed on Back:] #943. #11. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. Hays.

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 11." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 12.]

THE SCANDINAVIAN AMERICAN BANK,

Seattle, Wash., Nov. 23, 1905.

Received of W. F. Hays, Forty-six Dollars, for Wire transfer to Clerk Supreme Court, Olympia, Wash.

$46.00

THE SCANDINAVIAN AMERICAN BANK,
By F. P. TOREY.

STATE OF WASHINGTON,
Supreme Court,
C. S. Reinhart, Clerk.
WALLACE MOUNT, Chief Justice.
Judges

R. O. Dunbar	Hiram E. Hadley
Mark A. Fullerton	Milo A. Root
Frank H. Rudkin	Herman D. Crow

Olympia, Washington, Nov. 21, 1905.

W. F. Hays, Esq.,
Seattle.

Dear Sir: The following is a copy of the letter heretofore sent you:

Olympia, Nov. 9, 1905.

W. F. Hays, Esq.,
Seattle.

Dear Sir: Yours ordering a copy of the transcript O'Calligan vs. Carrau is at hand. As the law requires our fees to be paid in advance, kindly forward $46, and I will proceed with the work.

Yours Truly,
C. S. REINHART,
Clerk.

[Endorsed on Back:] 943. #12. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 12." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 13.]

[Written on Western Union Telegraph Company Blank.]

42 PO BR OR 15 D H 193

Portland, Or., Oct 16, 1905.

W. F. Hays, Atty. at Law, N. Y. Bldg.,
Seattle, Wn.

Will reach Seattle late tonight. Breakfast with me at Washington Hotel nine o'clock tomorrow morning.

JOHN H. MITCHELL.

10:03 a

[Endorsed on Back:] #943. #13. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. Hays.

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 13." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 14.]

(COPY.)

Portland, Oregon, Nov. 24/05.

Hon. Charles H. Aldrich,
Attorney at Law,
Home Insurance Building,
Chicago, Ill.

Hays, and I engaged preparing papers for Writ of error, Supreme Court, United States, in very complicated important case. It is impossible without great sacrifice for Hays to leave for Chicago until Thursday next, we hope your case can be postponed few days.

JOHN H. MITCHELL.

[Endorsed on Back:] #943. #14. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 14." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 15.]

(COPY.)

John H. Mitchell.

Allan R. Joy,
Notary Public.

MITCHELL & JOY,
Lawyers,
208-209-210 Columbia Block,
cor. Washington & W. Park,
Phone Main 6599,
Portland, Oregon.

November 14, 1905.

Hon. H. D. Mount,
Chief Justice Supreme Court, State of Washington,
Olympia, Washington.

My dear Judge:—As I understand some question has been raised by Miss Marie Carrau as to my right, and the right of W. F. Hays to appear in her case recently argued and decided in the Supreme Court of your state, I deem it proper that I should submit to you the papers which I felt authorized me to appear in that case; I enclose you therefore herewith a copy of the Articles of Agreement entered into between W. F. Hays and myself on the 18th of October last. Attached thereto and a part of the agreement, you will find four exhibits marked respectively A, B, C, and D. I was also at the date of entering into the two agreements with Mr. Hays, first, Exhibit "A," being his letter to me in Washington, of date April 23, 1904, and at the time of entering into the second agreement of date October 18th, assured by Mr. Hays that the relation between

himself and Miss Carrau had never been changed or dissolved and that he still regarded himself and was, as he stated, the chief counsel of Miss Carrau.

I have felt from the first, and still feel, that I had full authority to appear as I did with Mr. Hays in his recent application for a rehearing. As it is our intention to apply to you at an early date for a writ of error to the Supreme Court of the United States, I sincerely hope the papers in the case may not for a reasonable time be forwarded to the lower court.

—Page 2. (Over)

We have requested a transcript to be made at the earliest moment and will make our application for writ of error just as soon as the papers can be completed.

I am,

Very respectfully,

JOHN H. MITCHELL.

[Endorsed on Back:] 943. #15. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 15." Received Jun. 27, 1910. F. D. Monckton, Clerk.

Hays' Exhibit No. 16.]

JOHN H. MITCHELL, Chairman.

Jos. R. Hawley.
R. A. Alger.
L. H. Ball.
Levi Ankeny.
W. B. Heyburn.

C. A. Culberson.
J. P. Taliaferro.
A. S. Clay.
F. McL. Simmons.
M. J. Foster.

Harry C. Robertson, Clerk.

Committee on Coast Defenses,
UNITED STATES SENATE,
Washington, D. C.,

April 30, 1904.

W. F. Hays, Esq.,
Cambridge, Illinois.

My dear Mr. Hays:

I will have the briefs ready for the printer by Monday. I find on an examination of the rules it will be utterly useless for us to give notice of our motion to dismiss, unless we fix a date for its hearing, and under the rules of the court this notice must be given thirty days before, where the party resides west of the Rocky mountains. At least that is what they tell me now. Consequently, it will be impossible for us to give notice that would be good for that date.

The certiorari of course can be heard and I think will be decided by that time, May 30th, or perhaps by the 16th, if we get our brief filed within the next two or three days.

I have concluded, therefore, that the only thing we can do, and be within the rules, is to give notice that we will move to dismiss the appeal on Monday the 9th day of October, which is the date of the meeting of the Supreme Court. Any other notice would be

simply of no account, and the court would not listen to the motion unless the proper notice was given. Possibly they may advise McKinney to appear for them here. If they do so, then we could serve notice on him, provided he appears any time before three weeks before the 30th of May, as three weeks notice is all that is necessary to serve here.

—Page 2.

I will forward the briefs to you, when printed, at Seattle. I have not yet received a letter from Miss Carrau.

Yours very truly,

JOHN H. MITCHELL.

[Endorsed on Back:] 943. #16. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 16." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 17.]

AGREEMENT BETWEEN W. F. HAYS AND JOHN H. MITCHELL.

SUPPLEMENTAL ARTICLES OF AGREEMENT, Made and entered into at Seattle, Washington, between W. F. Hays, Attorney at Law, of Seattle Washington, and John H. Mitchell, Attorney at Law, of Portland, Oregon, as follows:

WHEREAS, on April 23rd, 1904, the undersigned, W. F. Hays, party of the first part herein, applied to

John H. Mitchell, party of the second part herein, at Washington, D. C., for the purpose of retaining and employing him to aid him, the said W. F. Hays, in preparing briefs and arguing a cause then pending in the Supreme Court of the United States, being numbered 593, October Term, 1903, and entitled Hannah O'Callighan and Edwin Corcoran, appellants, and Terrence O'Brien, as administrator, etc., and Maria Carrau, respondents. The said Hays, for the purpose of showing the said Mitchell his authority to so retain and employ the said Mitchell, submitted to him, the said Mitchell, then and there certain agreements of which the following exhibits hereto attached, are copies, and entitled respectively Exhibits "A," "B," "C" and "D"; and

WHEREAS, on said 23rd day of April, 1904, at Washington, D. C., said Hays did retain and employ said Mitchell to aid him in said cause in said Supreme Court, by a writing of which Exhibit "A," hereto attached, is a copy, which employment was accepted by said Mitchell, and he immediately, in conjunction with said Hays, prepared certain motions and briefs which were filed in said cause, and all of which were intended for the protection of the interests of said Maria Carrau and Terrence O'Brien, Administrator, respondents; and,

WHEREAS, subsequently the said United States Supreme Court decided said cause in favor of said respondents for whom said Hays and Mitchell appeared and affirmed the judgment of the Circuit Court of Appeals therein; and,

WHEREAS further judicial proceedings in which the said Sullivan Estate and the interests of said Maria Carrau and W. F. Hays are involved, are still pending in the Supreme Court of the State of Washington, and in reference to which, and also in reference to any and all other proceedings which may at any time hereafter arise in any court, State or Federal, in which the interest of said Maria Carrau in said Sullivan Estate is involved, said Hays desires the aid and assistance of said John H. Mitchell as his associate counsel, it is therefore hereby agreed that said W. F. Hays, party of the first part herein, does on this date, October 18th, 1905, retain and employ said John H. Mitchell, party of the second part herein, to appear with him as associate counsel for said Maria Carrau in said cause now pending in the Supreme Court of the State of Washington, and in any and all other and further actions, suits and proceedings which may hereafter arise in any State or Federal court involving the interests of said Maria Carrau and said W. F. Hays in said Sullivan estate; which retainer and employment on the terms herein expressed, the said Mitchell accepted and does hereby accept.

And said W. F. Hays hereby covenants and agrees with the said John H. Mitchell that in case of final success establishing the validity of the nuncupative will of said Sullivan and the right of said Maria Carrau thereunder to the said Sullivan estate, that he, the said W. F. Hays, party of the first part herein, will pay to the said John H. Mitchell, party of the second part herein, as full compensation for his said

services as associate counsel and for services rendered said Maria Carrau and said W. F. Hays in acting for and protecting each of their interests under said will and the interest of said Hays under his said retainer and agreements with said Maria Carrau the sum of Twenty-five Thousand ($25,000.00) Dollars in cash; provided, however, in case of any compromise of said controversy for a less sum than the value of the entire estate involved to said Maria Carrau by mutual consent between us, that the compensation to said Michell shall be in like proportion reduced in amount; but in no event shall such compensation to said Mitchell be less than Fifteen Thousand ($15,000.00) Dollars.

It is further agreed that said Mitchell shall not be liable for any court costs, or costs of printing any briefs in connection with any legal controversies concerning said estate.

All of the foregoing stipulations and agreements are agreed to by the said John H. Mitchell.

It is understood, however, that said John H. Mitchell shall not be called on to render any services or appear in any of the courts in the states of Washington or California at any time when the United States Senate is in session, or for a period of ten days prior to the convening of, or for ten days after the ending of such session, so long as said Mitchell shall continue to be a United States Senator.

The said Mitchell, party of the second part herein, hereby covenants and agrees to do all in his power in connection with said Hays to protect the interest and

claims of said Maria Carrau in said Sullivan Estate under said nuncupative will.

IN TESTIMONY WHEREOF the parties hereto have hereunto set their hands and affixed their seals in duplicate this eighteenth day of October, 1905.

W. F. HAYS.
JOHN H. MITCHELL.

EXHIBIT "A."

Washingon, D. C. April 23rd, 1904.

Hon. John H. Mitchell,
Washington, D. C.

Dear Sir:

I desire your assistance in the cause now pending in the United States Supreme Court, Numbered 593, wherein Hannah O'Callaghan and Edward Corcoran are appellants, and Terence O'Brien, as administrator, etc., and Marie Carrau are respondents, and to join with me in the case, in said court, in such briefs and procedure as we shall deem necessary and proper on behalf of the respondent Marie Carrau.

As my compensation is dependent upon the successful conclusion of the case for Miss Carrau, I am unable to advance a cash retainer, but will give you, in case of our successful ministration on her behalf, ten thousand dollars. Should, however, we conclude to compromise the case later on, and mutually agree so to do, it may be practical for this amount, in such event, to be varied. This, however, is left entirely to your discretion.

Sincerely yours,
W. F. HAYS.

EXHIBIT "B."

Seattle, Wash., Oct. 10, 1900.

THIS MEMORANDUM WITNESSETH that

WHEREAS, the late John Sullivan died in the City of Seattle, on the 26th day of September, 1900, leaving a large estate in money and property, and in which the undersigned, Marie Carrau, is by right and lawfully entitled to inherit the same, or at least a large portion thereof, and

WHEREAS, it is necessary for the said Marie Carrau in order to assert her right to said interest in said decedents estate it is necessary to prosecute an action at law, or some other proceeding to be taken,

THEREFORE, the undersigned, Marie Carrau, hereby retains and employs W. F. Hays, Attorney at Law, to take such proceedings and prosecute such suit or suits, action or actions as to him shall seem most proper and expedient under the facts and the law, and for such services the said Marie Carrau agrees to pay to the said Hays as Attorney's fees a sum of money equal to one half (½) of whatever sum may be realized by him for her in any such action or proceeding, or by any compromise that may be affected, and this to be compensation in full to the said Hays for such services.

It is understood that whatever costs, fees or charges of the Court in such action or proceeding that may be required to be advanced shall be deducted from the sum so recovered and the sum payable to the said Hays shall be reckoned upon said basis.

It is further understood that said compensation in case of the securing of property that the property to be paid shall be equally divided according to the conditions of this employment by mutual division.

This agreement in duplicate.

MARIE CARRAU.
W. F. HAYS.

Witness:

LOUIS DAUSSAT.
ALICE BARTA.

EXHIBIT "C."

THIS MEMORANDUM OF AGREEMENT WITNESSETH, That

WHEREAS, the late John Sullivan died in the City of Seattle on the 26th day of September, 1900, leaving an estate consisting of money, personal property and real estate estimated to be worth about the sum of Five hundred thousand dollars ($500,000); and the said John Sullivan prior to his said death, to wit, on the 25th day of September, 1900, made, declared and published his last will and testament, by the terms of which will he made the undersigned Marie Carrau his sole legatee, and

WHEREAS, it is necessary for the said Marie Carrau in order to assert her right under said will to be decedent's estate, and for the purpose of obtaining the ultimate ownership of said estate, or whatever right, title or interest she may have, or may hereafter have, or decreed to her, it is necessary to employ Attorneys, and for such purpose the said, the undersigned Marie Carrau hereby retains and em-

ploys as her principal and Senior Counsel W. F. Hays, Attorney at Law, and she hereby authorizes and empowers the said W. F. Hays to take such proceedings and prosecute such suit or suits, action or actions, as to him shall seem most proper and expedient under the facts and the law; and the said Marie Carrau hereby agrees not to employ any other additional or associate Counsel or Attorney without the written consent and direction of the said Hays, the said Hays to have the sole direction and management of the matters connected with the estate of the said John Sullivan as above indicated, and

I HEREBY AGREE TO PAY to the said Hays as my said Attorney a sum of money equal to one half (½) of whatever sum of money may be obtained for the said Marie Carrau, and a sum of money equal to one-half (½) of whatever sum that may be recovered herein in the form of property, the valuation thereof to be made by the said Hays and the undersigned Marie Carrau by mutual agreement as to said valuation, if agreement thereon is had, and if not, that the sum may be determined by arbitration as to the amount and value of the property so recovered for the said Marie Carrau, and

IT IS UNDERSTOOD AND AGREED on the part of the said Marie Carrau that she will pay such compensation either in cash or by the execution of a first mortgage upon the property so obtained by her, or that she will execute a deed for the undivided one-half (½) interest in said property when the same shall have been by her obtained.

IT IS FURTHER UNDERSTOOD AND AGREED that the said Marie Carrau shall have the right to employ, with the consent and approval of the said Hays, associate Counsel herein, and to pay said associate Counsel a sum of money not exceeding 10% of the entire sum of said estate, and when so paid or final settlement shall be made between the said Marie Carrau and the said Hays that the sum paid out for associate Counsel shall be deducted from the sum total of said estate, and the amount payable under the terms of this contract to the said Hays to be bottomed upon the sum remaining after making said deduction for the said associate Counsel.

IT IS UNDERSTOOD that whatever costs, fees or charges of the Court in such action or proceeding that may be required or advanced shall be paid by the said Marie Carrau out of said estate, and the sum herein agreed to be paid to the said Hays is to be the one-half (½) of said estate after making said deductions for associate Counsel and costs or necessary expenses in the premises.

IN WITNESS WHEREOF we have hereunto set our hands this 7th day of March, 1901, at Seattle, Washington.

MARIE CARRAU.
W. F. HAYS.

EXHIBIT "D."

June 15th, 1901.

I the undersigned have this day retained and hereby employ Jos. W. Robinson, Attorney at Law of Olympia, Washington, to act for me in the capacity

of associate Counsel in the matter of enforcing my claims to the property both real and personal left to me by the late John Sullivan, whose estate is now in process of settlement in the Superior Court of King County, Washington, Said Robinson is to give his best talents and employ his best energies for me and in my behalf as such Attorney until the final vesting in me of the property of said estate or so much thereof as shall be decreed to me finally, and said Robinson is to co-operate with my senior Counsel W. F. Hays of Seattle, Washington.

I am to pay to said Robinson for such services in case I am finally decreed both the real and personal property of said estate the sum of Five thousand dollars but should I be finally decreed the personal property of said estate and not the real estate, then and in that event I am to pay the said Robinson as such Attorney for said services the sum of Five hundred dollars the same in either case or event to be in full of all demands.

MARIE CARRAU.

Witness;

W. F. HAYS.

[Endorsed on Back:] #943. #17. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 17." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 18.]

Seattle, Wash., April 19, 1902.

WHEREAS the undersigned Marie Carrau is prosecuting a suit in the Superior Court of King County, Washington, and also in the Federal Court to establish in her favor a will of the late John Sullivan, deceased, and necessarily is required therein to expend money in payment for testimony taken before the Special Commissioner, Eben Smith, Esq., in the sum of Four Hundred and Fifty Dollars, and in order to secure said testimony it is necessary to give a promissory note therefor, secured by W. M. Russell as surety, and to compensate the said Russell for such assistance in furnishing the said $450;

It is hereby mutually agreed that in the event the said Marie Carrau shall succeed in establishing the will of the said John Sullivan, deceased, and in obtaining the property of the said Sullivan under said will, the said Marie Carrau, in addition to the repayment of the said $450 with interest at eight per cent per annum, hereby agrees to give as a bonus to said Russell the further sum of Five Hundred Dollars ($500) when the same shall be by her obtained out of said estate.

In witness whereof the parties have hereunto set their hands this 19th day of April, 1902.

MARIE CARRAU.

[Endorsed on Back:] #943. #18. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 18." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 19.]

Seattle, Wn., March 28, 1902.

Mr. W. F. Hays,

To EBEN SMITH, Master in Chancery, Dr.

To services of the Master in Chancery and stenographers, in case No. 943, Hanna Callahan et al. v. Terence O'Brien et al.,

Feb.	3, hearing adjourned	$ 10.00
"	10, 15, 18, 19, 20, hearing of testimony, @ $20 per day, five days	100.00
"	21, 24, 25, hearings adjourned, 3¼ days.	30.00
Mch.	3, hearing adjourned, ½ day	10.00
"	4, hearing of testimony	20.00
"	5, and 6, two days hearing testimony	40.00
"	7, hearing adjourned	10.00
"	8, and 10, hearing of testimony, two days	40.00
"	11, 12, 13, 20, 21, 22 and 24, reading of testimony at which stenographer was present to report corrections, seven ½ days	70.00
"	17, 18, and 19, at which stenographer was not present during reading of testimony three half days	15.00
To administering oath to 16 witnesses @ 20¢ each		3.20
To transcript of 1345 folios original testimony of defendants witnesses, @ 20¢ per folio		269.00
		$617.20

[Endorsed on Back:] #943. #19. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 19." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 20.]

In the United States Circuit Court of Appeals.

No. ——

JOHANNA CALLAGHAN and EDWARD CORCORAN,

Complainants,

vs.

TERRENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU,

Defendants in Error.

PROOF OF SERVICE OF BRIEF.

State of Washington,
County of King,—ss.

J. J. Hays, being duly sworn, on oath deposes and says: That he is a citizen of the United States, residing in Seattle, King County, Washington, not a party to or interested in the above-entitled action, and competent to be a witness therein and over the age of 21 years.

That on this 27th day of January, 1903, between the hours of 9 o'clock A. M. and 4 o'clock P. M. at

the office of Piles, Donworth & Howe, Attorneys for complainants, at Seattle, King County, Washington, he served the complainants with the Brief of Defendant in Error by then and there delivering to James B. Howe, one of the attorneys for complainants, a printed and true copy thereof.

J. J. HAYS.

Subscribed and sworn to before me this 27th day January, 1903.

[Seal] NELSON MACPHERSON,
Notary Public in and for King County, Washington, Residing at Seattle.

[Endorsed on Back:] #943. #20. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. "Hays' Exhibit 20." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Hays' Exhibit No. 21.]

W. F. HAYS,
Attorney at Law,
New York Building. Seattle, Wash.

January 13th, 1904.

Miss Marie Carrau,
1417 Seventh Ave., CITY.

Madam: Owing to the present status of your case in the various courts, I deem it of vital importance

to both you and myself that the question of my further uninterrupted management and direction of the case be settled at the earliest date possible, and if we can not, within ourselves, amicably determine this matter, then, for the reasons above stated, I wish you to make your heretofore threatened application to the Court that this question may be settled at once. There are matters which require immediate action, and my interests in the case are too great, from a selfish standpoint, to be further waived. I have never deemed it necessary to answer seriatam your various and extensively enumerated "grievances." I feel that my service in your case has been of such inestimable value to you, that it would be a mockery for me to answer them. I have felt that certain evil and designing influences had wrought the effect upon you, which time would bring you to realize. It seems, however, I am in this disappointed. I, therefore, desire that you shall take such steps at once as shall be necessary to put an end to this controversy between yourself and myself. I am unwilling to risk the interests which I have in this case, in the hands of any other lawyer, as I believe I, having formulated the theory of the case from its inception, both offensive and defensive, am better qualified than any other man can hope to be.

Hoping that you will act in this matter at once, I am,

Yours very truly,

W. F. HAYS.

Dictated.

[Envelope.]

W. F. HAYS,
Attorney at Law.
New York Building. Seattle, Wash.

RETURN TO THE ABOVE ADDRESS.

~~Miss Maria Carrau,~~
~~1417 Seventh Avenue,~~
~~City.~~

[Endorsed on Back:] #943. #21. Main 1673. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Hays."

No. 1861. U. S. Circuit Court of Appeals for the Ninth Circuit. "Hays' Exhibit 21." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Robinson's Exhibit "A."]

THE HARPER HOUSE,
Rock Island, Ill.
Chas. McHugh,
Manager.

American Plan

THE NATIONAL
J. E. MONTROSE,
Manager.

Peoria, Ill., Sept. 16th, 1902.

My Dear Miss Carrau.

I am Just en route to Chicago and have a few minutes between trains. I suppose ere this reaches you the appeal will have been properly taken, though as I have always *contended* Hanfords decision unappealed from or *unreversed* can not be successufully invoked in the State Court or elsewhere against us,

though I advised appeal on account of the *moral* effect. I shall however leave the matter of appeal to my associates agreeable to your expressed wishes.

I hope you will allow nothing to discourage you as to the ultimate results nor allow any *poison* to enter your *ear* to divide you from my fullest confidence as your success in this case *hinges* on this *certainty.*

In haste

Sincerely Yours,

W. F. HAYS.

[Endorsed on Back:] 943. A. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. Robinson.

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. Robinson's Exhibit "A." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Robinson's Exhibit "B."]

F. D. Monckton,
Clerk.

Office of Clerk
U. S. CIRCUIT COURT OF APPEALS,
for the Ninth Circuit.

San Francisco, Cal., 16 Decr. 1902.

Marie Carrau,
1417 Seventh Ave., Seattle, Wash.

Dear Madam: Under the provisions of Rule 23 of the Rules of Practice of the Circuit Court of Appeals, I beg to notify you that the estimated expense of printing the record, including the clerk's fee for supervision, etc., in the cause entitled Marie Carrau

v. O'Callaghan et al., No. 925, amounts to the sum of fifteen hundred and twenty-two and 80/100 (1522.80) dollars.

You will please note that the above amount must be *promptly* paid over to me, and if, for the want of such *prompt* payment, the record shall not have been printed when the case is reached for argument, the same *shall be dismissed.*

I respectfully invite your immediate action in the matter.

Remit only by draft or postal money order. Checks by mail not credited.

Very truly yours,

F. D. MONCKTON,

Clerk.

RULE 23—PRINTING RECORDS.

"1. Hereafter all records shall be printed under the supervision of the clerk, and upon the docketing of a cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. * * * "

DISTRICT OF WASHINGTON

$19. Seattle, Dec. 19, 1902.

Received from Marie Carrau ~~Proctor Attorney for~~ the sum of Nineteen Dollars on account Balance of Clerks fees in cause of Callaghan vs. Carrau No. 943, U. S. Circuit Court.

A. REEVES AYRES,
Clerk.

By H. M. Walthew,
Deputy.

~~Referee's Fee.....$10.00~~
~~Clerk's Fee.....$10.00~~
~~Trustee's Fee.....$ 5.00~~

No. 925.

U. S. Circuit Court of Appeals,
for the Ninth Circuit.

MARIE CARRAU

vs.

HANNAH O'CALLAGHAN et al.

San Francisco, Feb. 14, 1903.

Due from Appellant.

Balance due on % of printing record..46.50

Received payment of the above, this 20 day of February, 1903.

F. D. MONCKTON,
Clerk.

In the Circuit Court of the United States for the District of Washington.

No. 943.

HANNAH O'CALLIGAN et al.,

Complainants,

vs.

TERENCE O'BRIEN, as Administrator, and MARIE CARRAU.

$400. Seattle, Wash., Oct 9, 1902.

Received, this day, of Marie Carrau, the sum of four hundred dollars ($400), the same being deposited by said Marie Carrau to cover the cost of the record on appeal now being prepared by me in the above-entitled action, said sum of $400 being my estimate of the amount of the cost of such record.

A. REEVES AYRES,
Clerk U. S. Circuit Court.
By R. M. Hopkins,
Deputy Clerk.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

No. 943.

HANNAH CALLAGHAN and EDWARD CORCORAN

vs.

TERENCE O'BRIEN, as Administrator, &c., and MARIE CARRAU.

Marie Carrau,

In account with

R. M. HOPKINS, Deputy Clerk. Dr.

	To fees incurred by Respondent in filing papers, recording orders, etc., during progress of suit....	$ 10.45
Dec. 11.	To preparing and certifying record on appeal on behalf of Respondent, 4029 fo. @ 10¢.....	402.90
	To Clerk's certificates to record and exhibits, 4 @ 35¢ ea.....	1.40
	To cash disbursed for binding record	2.00
	To cash disbursed for expressage on record	2.25
		$419.00
	Credit by cash deposit made by appellant upon perfecting appeal.	400.00
	Balance due me	$ 19.00

JOHN F. DORE.
Lawyer,
Seattle, Washington.

May 2/03.

Received of Miss Marie Carrau Twenty-two and 50/100 Dollars on acct. printing Briefs.

JOHN F. DORE.

K

[Endorsed on Back:] # 943. B. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. "Robinson."

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. Robinson's Exhibit "B." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Robinson's Exhibit "C."]

Law Office of
J. W. ROBINSON
Olympia, Wash.

Olympia, Washington, April 13th, 1908.

Miss Marie Carrau,
232 Belmont Avenue, North,
Seattle, Washington.

Dear Miss Carrau: Your recent letter has been neglected because I have been away from home, but I enclose you herewith a carbon copy of the assignment of the judgment and attached thereto a statement which will explain itself.

This has all been done in accordance with our talk and the purpose was to protect everybody who had advanced money to assist you, including myself, and if the Irish-heirs secure title to this property, this judgment will of course be good and be paid, and I will apply the funds from the same in accordance with your direction, to Mr. Russell, Mr. Shasty, Mr. Ferguson and all others holding an interest therein.

As I have said to you often, I will collect the judgment against the United States Fidelity and Guaranty Company, as soon as possible and certainly your friends should know that I will not give them any more time than I can possibly help, but I do not intend to be foolish and attempt to do things which the law prevents me from doing, and when the same is paid I will certainly apply it as you have directed, and I have already arranged so that if anything should happen me, it goes back to you.

Yours very truly,

J. W. ROBINSON.

[Endorsed on Back:] #943. C. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. Robinson.

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. Robinson's Exhibit "C." Received Jun. 27, 1910. F. D. Monckton, Clerk.

[Robinson's Exhibit "D."]

Office of the Clerk,
SUPREME COURT OF THE UNITED STATES,
Washington, D. C.

July 3, 1905.

J. W. Robinson, Esq.,
Olympia, Wash.

Dear Sir: I today received a telegram signed Marie Carrau as follows: "Hays does not represent me. Do not send mandate or fee to any one but Robinson." On the 27th ult., I mailed the mandate in case of Farrell, Adm'r, et al. v. O'Brien, Adm'r, et al., No. 193, Oct. Term, 1904, to William F. Hays, Care Palmer House, Chicago, Ill., and I have today written to him, requesting him to at once forward the mandate to the clerk of the U. S. Circuit Court for the Western District of Washington and informing him that if he does not do so a duplicate of the mandate will be issued by me to said clerk. If the mandate sent to Mr. Hays is not filed with the above mentioned clerk in due time, I will at once send a duplicate of same to the clerk on receipt of advice from you or said clerk that the mandate has not yet been received and filed. Check for amount of taxed attorney fee, $20.00, was sent to Mr. Hays with the mandate, and as his appearance is regularly entered for appellees in the case as well as yours and that of John H. Mitchell, and there was nothing on file with me to show that he was no longer of counsel in the case, the matter of the attorney respondents in above case will be the one attorney fee of $20.00.

Nothing has been done by the Court in case "In the Matter of the petition of J. W. Robinson and Marie Carrau for a writ of habeas corpus" since the case was docketed. It is numbered 111 on the docket for the October Term, 1905, and will probably be reached for hearing some time during the month of December, 1905.

Yours truly,
JAS. H. McKENNEY,
Clerk, Supreme Court, U. S.

[Endorsed on Back:] #943. D. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Dep. Robinson.

No. 1861. U. S. Circuit Court of Appeals, for the Ninth Circuit. Robinson's Exhibit "D." Received Jun. 27, 1910. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee of a Certain Judgment,
Appellant,
vs.
W. F. HAYS and W. M. RUSSELL,
Appellees.
No. 1861.

IN THE MATTER OF THE ESTABLISHMENT OF A CERTAIN LIEN CLAIM OF W. F. HAYS, ETC.

Motion to Dismiss Appeal

W. F. HAYS,
REYNOLDS, BALLINGER & HUTSON,
Solicitors for Appellee.

The Ivy Press, Second and Cherry, Seattle

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee of a Certain Judgment, *Appellant,* *vs.* W. F. HAYS and W. M. RUSSELL, *Appellees.*	No. 1861.

IN THE MATTER OF THE ESTABLISHMENT OF A CERTAIN LIEN CLAIM OF W. F. HAYS, ETC.

Motion to Dismiss Appeal

W. F. HAYS,
REYNOLDS, BALLINGER & HUTSON,
Solicitors for Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee of a Certain Judgment, *Appellant,* *vs.* W. F. HAYS and W. M. RUSSELL, *Appellees.*	No. 1861.

IN THE MATTER OF THE ESTABLISHMENT OF A CERTAIN LIEN CLAIM OF W. F. HAYS, ETC.

Motion to Dismiss Appeal

STATEMENT.

On the 6th day of June, 1910, W. F. Hays and W. M. Russell, by their respective solicitors, duly and properly served and filed the following motion to dismiss the appeal of J. W. Robinson in the above-entitled cause:

"Come now W. F. Hays and W. M. Russell and move the court to dismiss the appeal herein for the following reasons:

"1. It appears, upon the face of the record and supplemental record hereto, that the order appealed from has been in all things fully adopted by the appellant, and therefore he is thereby estopped from

appealing therefrom and his appeal is thereby waived.

"2. It appears from the record and the supplemental record herein that the order appealed from was obtained upon petition of the appellant, and that he is therefore bound by said order and the same is not appealable.

"This motion is based upon the records and files in this cause, especially upon the following record facts:

I.

"(a) The matter under consideration by the Circuit Court for the Western District of Washington was the distribution of certain costs awarded to respondent Marie Carrau in the above-entitled cause. On July 6, 1909, the said Circuit Court rendered its memorandum decision directing, among other things, that the sum of $1,500 and interest thereon be apportioned to W. M. Russell, and the surplus divided between W. F. Hays and J. W. Robinson. Said court further directed that 'Robinson shall have a right to control proceedings for collecting the judgment, as under the statute, if an execution is necessary, it must be issued in his name.' No formal order based upon said memorandum decision was signed and filed, but thereafter, on the 15th day of October, 1909, execution was issued as directed in said memorandum decision at the request of said J. W. Robinson, and said judgment for costs collected and placed in the registry of said court in pursuance of said request for execution. It is respectfully submitted that thereupon and thereby said J. W. Robinson accepted and adopted the direction of said memorandum decision and received the benefits thereof, and thereby waived his right to appeal from any part or from all said memorandum decision.

"(b) That thereafter, on the 10th day of May, 1910, and after the record of this appeal had been forwarded to this court, said J. W. Robinson requested and secured an order in this cause from the said Circuit Court permitting him to 'apply such portion of said funds now in the registry of the court belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal and charge said fund with such amounts.' This order is before this court by means of a supplemental record, a copy of which order is also attached hereto and made a part hereof. It is respectfully submitted that this order is a complete adoption by said J. W. Robinson of the order distributing said funds, signed and filed on January 24, 1910, and an acceptance by him of the funds awarded to him by said Circuit Court in said order, and he cannot enjoy the benefit of said order and appeal thereon; that he is estopped by his own act.

II.

"That in January, 1910, said J. W. Robinson filed a petition in said Circuit Court requesting said Circuit Court to modify said memorandum decision of July 6, 1909. Said matter came regularly on for hearing and said Circuit Court in part granted said petition in this, to-wit: said Circuit Court required that certain witness fees referred to in said petition be paid and that the balance of said fund be distributed as directed in the court's memorandum decision of July 6th, 1909.

"Thereafter, on January 24, 1910, the order of distribution (the one now appealed from) was signed by said court and duly filed, distributing said funds in accordance with the decision as so modified.

"It is respectfully submitted, that such order as so modified was the result of appellant's own peti-

tion, and he is now estopped from appealing thereon."

On pages 4 and 5 of the record will be found the assignment of judgment for a consideration from Marie Carrau to J. W. Robinson, upon which the application of said Robinson for distribution thereof was based. It will be noticed that the assignment was not conditional in any manner, but is a straight assignment for a valuable consideration by said Marie Carrau to J. W. Robinson personally.

Thereafter testimony was taken as to certain claims upon said judgment for costs, a hearing was had upon the petition of appellant Robinson, and after the testimony was taken the District Court filed the memorandum decision July 6th, 1909. (R., pp. 6-8).

In this the court says:

"To reach an equitable adjustment, the court directs that Robinson shall have a right to control proceedings for collecting the judgment, as, under the statute, if any execution is necessary, it must be issued in his name. The money, when collected, shall be applied to repayment of the amount actually loaned by Russell, with accrued interest, as provided in the two written contracts signed by Marie Carrau, dated respectively April 7, 1902, and April 19, 1902, *and the surplus, if any, to be divided equally between Hays and Robinson.*"

Nowhere is Robinson named therein as stakeholder, trustee, or anything of a similar nature. The assignment of the judgment was to Robinson personally. By reason of that assignment he was considered the proper party by the court to enforce the collection of the judgment for costs and after collecting the same a certain portion thereof was awarded to him personally.

Thereafter, on October 15, 1909, execution of said judgment for costs was issued, as directed, at the request of said J. W. Robinson. Thereafter, a petition was filed by said Robinson seeking modification of the said memorandum decision heretofore referred to (R., pp. 8-12). After considering the same, the said District Court denied it in part and signed and filed an order of distribution on January 24, 1910 (R., pp. 16-17). The order of distribution says:

"And the clerk of this court is hereby directed to distribute and pay over to the parties or their attorney the moneys derived under execution for costs herein, now in the registry of this court, in accordance with the terms and provisions of the decision of this court filed herein on the 6th day of July, 1909."

It is provided, however, in said order that in addition to the provisions of said memorandum decision referred to, the clerk was to retain witness fees as taxed.

Thereafter said Russell and Hays drew the money awarded to them from the registry of the court. On January 28, J. W. Robinson secured from the said District Court an order to show cause, a portion of which is as follows (R., p. 24):

"It is now ordered that W. M. Russell and W. F. Hays each repay into the registry of this court the sum, for Russell of seventeen hundred ninety dollars ($1,790.00), and the sum for Hays of four hundred ninety-six and 33/100 dollars (496.33), or show cause before this court on February 28, 1910, at the Federal court room at 10 o'clock A. M., why they should not be required to do so and why the said fund *should not remain in the registry of the court during the pendency of a proceeding to review said decision with reference to the distribution of said fund.*"

Thereafter, the said J. W. Robinson perfected his appeal. On the 10th day of May, 1910, after said appeal aforesaid had been perfected, said J. W. Robinson, on his own *ex parte* application, without notice or to the knowledge of the appellees, secured an order from the said District judge, which is as follows (Sup. R., p. 143):

"The appeal herein relating to the validity of the lien of W. F. Hays having been perfected and the estimate of the costs in preparing the record on appeal to the United States Circuit Court of Appeals having been fixed by the clerk at eighty-six and 80/100 dollars (86.80), and it appearing to the satisfaction of the court that there is no reason why the

funds in the registry of the court, having been determined to belong to J. W. Robinson as assignee of said judgment, should not be used by said appellant in payment of the expenses of such appeal,

"It is now therefore ordered that the clerk of this court apply such portion of said funds now in the registry of the court *belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal* and to charge said fund with such amounts."

'Dated at Seattle, Washington, May 10th, 1910.

"C. H. HANFORD, Judge."

ARGUMENT.

The law is well settled that one cannot accept the benefits of a decree or judgment, in whole or in part, and thereafter appeal from it. The following cases are cited:

Albright et al. vs. Oyster et al., C. C. A. 8th Circuit, 60 Fed. 664.

"We are of the opinion that the acceptance of this deed under the decree estopped the appellants from exercising any right of appeal they otherwise might have exercised. It was in receipt of a substantial benefit that they could not have obtained without the decree, and they ought not to be permitted to review the provisions of it with which they are not satisfied after deducting the benefit they have approved."

Chase vs. Driver, C. C. A. 8th Circuit, 92 Fed. 780-86.

"When the decree was entered he had the option to refrain from filing his bond and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree, which he had sought, and it is too late for him now to escape from the terms prescribed or the burdens imposed thereby. When he accepts the benefits of a decree or judgment, he is thereby estopped from reviewing it or from escaping from its burdens."

Darragh vs. Wetter Mfg. Co., C. C. A. 8th Circuit, 78 Fed. 7-10.

"After the property of the hardware company had been sold under the decree, and after the master had received the proceeds of the sale and on April 18, 1896, a hearing was had upon this petition of the appellant and the court found that the hardware company was indebted to him in the sum of $927.02; that the receiver had collected from the collateral pledged for the payment of his debt more than this amount, and ordered the master to pay him the $927.02 out of the moneys in his hand. The appellant accepted the payment, and it is upon this fact that the appellees base their motion for the dismissal of this appeal. It is sometimes the case that when he accepts benefits conferred upon him by a decree which he could not have secured without the decree, he cannot be subsequently heard to challenge it. He may not accept and select the advantageous terms of the decree and reject and successfully attack those that cause a burden upon him."

Bringham City vs. Toltec Ranch Co., C. C. A. 8th Circuit, 101 Fed. 85-89.

"When the verdict had been rendered, and the court had entered judgment against it for the possession of the entire 160 acres, the city had the option to refrain from conceding the validity of that adjudication, from paying the costs under it and the dollar assessed by the verdict as damages for the taking of the small tract which it sought to hold, and to sue out a writ of error to reverse that judgment, or to concede its correctness, take advantage of the verdict, pay the costs and damages, and procure the right to the property it sought by condemnation under the verdict. It chose the latter alternative. It took the benefit of the condemnation offered to it by the verdict of the jury and the judgment of the court, and it is now too late for it to escape from

the conclusions reached, or the burdens imposed thereby. One who accepts the benefits of a verdict, decree or judgment is thereby estopped from reviewing it or from escaping from its burdens."

Also see:

2 *Cyc.* 651, Note 71.

Robinson seeks to hide behind the statement that he is stake-holder or trustee for other persons whom he alleges have a right to a portion of said judgment for costs. We submit, however, that the assignment upon which the whole hearing was based is an assignment to him personally, the memorandum decision and the award and the order of distribution made thereon, each awards to him personally one-half of the remaining funds after the payment to W. M. Russell of the sum allowed him. The order which he obtained from the District Court, which he presented to the clerk of the court and upon which he drew down the sum therein mentioned and other additional sums amounting to between three and four hundred dollars (Sup. R., pp. 144-145), states:

"It is now therefore ordered that the clerk of this court apply such portion of said funds now in the registry of the court belonging to the said J. W. Robinson as may be necessary from time to time to meet his expenses incident to said appeal."

But even if he were trustee and stake-holder for other persons claiming an interest in said judgment, he nevertheless should not be permitted to appeal from the judgment after he had accepted the benefits of it, or that portion of the judgment at least which was favorable to him. That is what he did in this case. After the order of distribution had been signed and filed, Russell and Hays drew down the money awarded to them. Mr. Robinson thereupon secured a show cause order, ordering them to return the money into the registry of the District Court, to remain there during the pendency of his appeal, and immediately after perfecting his appeal he then drew down practically all of the money awarded to him. Instead of using money outside the registry of the court to pay his costs on appeal, he chose to use the money awarded him, and the mere fact that he secured the order of the District Court permitting him to do so does not relieve him from the fact that by so doing he accepted the judgment of the court and thereby waived his rights of appeal.

The orders of the court made upon the petition of the appellant Robinson are binding upon him and are not appealable.

2 *Cyc.* 650, Subdivision 2.

It is the universal rule that a party upon whose motion an order is made cannot appeal therefrom.

Storke vs. Storke, 111 Cal. 514;

The Matter of Radowick, 74 Cal. 536.

We respectfully submit that the appeal should be dismissed with costs.

W. F. HAYS,
REYNOLDS, BALLINGER & HUTSON,
Solicitors for Appellee.

IN THE

UNITED STATES
CIRUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee of a Certain Judgment,
Appellant,
vs.
W. F. HAYS and W. M. RUSSELL,
Appellees.

No. 1861

In the Matter of the Establishment of a Certain Lien Claim of W. F. Hays, etc.

Appeal from the United States Circuit Court of the District of Washington, Western Division

APPELLANT'S OPENING BRIEF

JAMES J. GODFREY and
J. W. ROBINSON,
Solicitors for Appellant.

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THE HOLLY PRESS

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STATEMENT.

1. "John Sullivan died September 26, 1900, at Seattle, King County, Washington," seized of property in that state which Marie Carrau claimed under a nuncupative will which was probated in the Superior Court of King County.

Hannah O'Callahan et al., claiming to be the only living heirs of the deceased, opposed the claim under

the nuncupative will and litigation ensued in both the state and federal courts, continuing for many years and until the state courts decreed that Marie Carrau had no right under the will.

2. O'Callahan et al. instituted suit in the Circuit Court of the United States for the Western District of Washington against Administrator O'Brien and Marie Carrau, by which they sought to annul such will and the probate thereof. The Circuit Court entered a decree in favor of O'Callahan et al., from which Marie Carrau appealed to the United States Circuit Court of Appeals for the Ninth Circuit and this court reversed the Circuit Court and directed the action to be dismissed and for costs in favor of Marie Carrau. O'Callahan et al. caused the decision of this court to be reviewed by the Supreme Court of the United States and the decision of the United States Circuit Court of Appeals was affirmed (See *O'Callahan et al. vs. O'Brien et al.,* 60 C. C. A. 347; 125 Fed. 651; same case, 199 U. S. 89).

3. Upon filing the mandate of the Supreme Court of the United States the Circuit Court of the United States for the District of Washington on August 7, 1905, entered judgment of dismissal and for costs in favor of Marie Carrau and against complainants in the sum of $2619.90.

4. On March 16, 1908, Marie Carrau assigned

said judgment to J. W. Robinson to be collected by him and disbursed pro rata to all those who had advanced money to her to carry on the litigation in the federal court (Trs. 4), which assignment was filed in the Circuit Court March 26, 1908.

O'Callahan et al. appealed to the Supreme Court of the United States from the judgment of dismissal and for costs entered August 7, 1905, which was affirmed (See 208 U. S. 613).

6. The complainants in the Circuit Court had given security for costs in favor of the respondents in the sum of $400 with the United States Fidelity & Guaranty Company as surety.

7. The sureties on the cost bond refusing to pay, Marie Carrau entered suit in the state court against the company and secured judgment for the sum of $400 with interest and costs, which was appealed to the Supreme Court of the state and affirmed and thereafter this amount was collected and paid by Marie Carau to W. M. Russell, one of these appellees (Trs. 106) and the same credited on the judgment for costs herein mentioned.

8. After the assignment to Robinson, W. F. Hays secured an execution upon this judgment for costs and instituted garnishee proceedings against a large number of tenants of the Sullivan Block in the

city of Seattle, which proceedings were quashed by the Circuit Court.

9. W. F. Hays claiming a lien against the judgment assigned to Robinson and taking no action to establish his rights under such alleged lien, Robinson applied to the Circuit Court and was granted a show cause order against Hays requiring him to establish his claim of lien and proceedings were had with reference thereto, beginning on page 45 of the Transcript, and that this Honorable Court may understand the situation we quote from this, page 46:

> "COURT.—The court has isued an order to show cause in order to settle the question as to who was entitled to take the necessary steps to get this fund. Mr. Hays has initiated proceedings to collect it, and on examination of the record I find that he is not entitled to proceed in that manner on his own initiative. Now, if there is anything further to be done, it ought to be ascertained who should push the matter."

In reply to the court Mr. Hays said in substance, that the judgment had remained inactive for more than two years; that no steps had been taken to enforce it, that,

> "So far as the distribution of the money is concerned I have an interest in this judgment to the extent of moneys that I myself have advanced in the case to which I would be entitled to a final order of this court, and the others who have advanced funds for the plaintiff in the original suit. * * * I filed a lien as a counsel in

the case, as attorney in the case, upon the judgment, for the purpose of preserving the fund to the time that the money might be subject to distribution and then if that lien is improper or illegal it will be the duty of the court to determine. * * * I could get on the witness stand this morning and tell your honor just what money I have paid out. I know I have paid out hundreds and perhaps a thousand dollars I would not charge against this judgment. I do not see how, even if your honor has all the evidence in on the side of the plaintiff, as assignee, or on the side of myself, who seeks to enforce the lien for moneys advanced—I do not see how your honor could now determine how much the interest would be in the judgment. * * * I have no controversy with counsel or controversy with this plaintiff, Miss Carrau, as to how this money shall be distributed. * * * I am willing to have your honor dictate who shall enforce the collection of this judgment. I would be glad to be relieved of that burden. I do not want it and I don't see any necessity for trouble between counsel or warfare as to how the money shall be distributed if it ever shall be obtained."

The Circuit Court then announced:

"You may go on, I will hear it. (To Mr. Hays.) You may proceed in your own way to show me that you are entitled to proceed. You are here now to show me you are entitled to the lien."

Thereupon Mr. Hays proceeded to introduce evidence in support of his lien, which is found, beginning on page 52 of the Transcript, being the bill of exceptions, and which includes in addition to the oral testimony the exhibits introduced by Mr. Hays in

support of his lien and the testimony and exhibits introduced in opposition thereto.

The matter was thus submitted to the Circuit Court and thereafter a memorandum decision was filed July 6, 1909 (See Trs. 6) in which the court found that Russell, one of these appellees, had made a loan of $425, repayment being guaranteed by Hays, and that altogether Russell had advanced for expenses of litigation to Miss Carrau fifteen hundred dollars, and his honor in such decision said:

> "To reach an equitable adjustment the court directs that Robinson shall have the right to control proceedings for collecting the judgment, as under the statute if any execution is necessary it must be issued in his name. The money when collected shall be applied to repayment of the amount actually loaned by Russell with accrued interest as provided in the two written contracts signed by Marie Carrau dated respectively April 7, 1902 (See Ex. 3, page 157) and April 19, 1902 (But we are unable to find any contract of this date introduced in evidence) and the surplus if any to be divided equally between Hays and Robinson."

9. After waiting until December, 1909, for Mr. Hays to present a judgment in accordance with such memorandum decision establishing his lien and failing to do so, Robinson gave notice requiring that the record be perfected so that a final judgment might be entered from which an appeal might be taken, and also moved for a reconsideration of the conclusion of

the court as to the establishment of such lien, and Robinson in the meantime having collected the judgment and caused the funds to be paid into the registry of the court, made application to the court on December 15, 1909, to have the funds distributed pro rata to the various persons who had advanced funds to carry on the litigation, in addition to those claimed by Hays and Russell (Tras. 8 to 16 inc.)

On January 25, 1910, the application for a reconsideration of the decision made on July 6, 1909, establishing the Russell-Hays lien was denied by the Circuit Court and the petition for distribution of the moneys pro rata was denied, and on February 23, 1910, R. J. Ferguson et al., who had also advanced funds to Miss Carrau to carry on the litigation, filed their verified petition in that cause in which the funds had been collected and were in the registry of the court, asking to be allowed to intervene and claiming their share of such judgment for costs, and asking that an order of distribution be made accordingly (Trs. 26) and this petition was denied and the petition stricken (Trs. 38-40).

On January 25, 1910, the court entered a final order with reference to the memorandum decision of July 6, 1908, and directed the clerk to pay to Russell $1790 and to Hays $496.33, which was done, and the next day Robinson applied to the court for a show

cause order requiring said funds to be returned into the registry of the court, or show cause why they should not be, and also applied to the court in the usual manner, by petition, assignment of error, etc., for an order allowing an appeal and fixing a supersedeas bond, and on February 28, 1910, the Circuit Court fixed the supersedeas bond at one thousand dollars and ordered that the said Hays and the said Russell repay into the registry of the court the money so withdrawn, upon the filing and approval of such bond (Trs. 41) Petition, Order allowing Appeal, Approval of Bond (Trs. 121-9).

From these orders and judgments the appellant as such stakeholder has appealed to this court.

ASSIGNMENT OF ERROR.

1. The Circuit Court erred in not holding that neither Hays nor Russell had any lien.

2. That if Hays ever had a lien he lost his rights by laches.

3. The court erred in allowing Russell $1790.00 or any other sum, and erred in holding that Russell was before the court for any purpose whatever.

4. The court erred in allowing Hays $496.33 and in not holding that he had not taken the necessary

steps to perfect a lien if he had one, and that his testimony was wholly insufficient to establish an amount necessary to foreclose or establish the lien.

5. The court erred in holding that there was anything whatever due the said Hays by way of money advanced, because the burden was upon him to establish that fact by a fair preponderance of the evidence.

6. The court erred in holding that the evidence was sufficient to establish any amount due Hays or Russell, or sufficient to establish or foreclose the lien.

7. The court erred in refusing to reconsider its action as contained in its memorandum decision of July 6, 1909, and in not granting a rehearing.

8. The court erred in not granting the application for a distribution of this fund pro rata among those who filed their petition and motion and came into court to have that question determined, and in striking the same.

9. The court erred in holding that it had any jurisdiction whatever to determine any question of fact or law between Russell and the other interested parties, including the assignee of the judgment and Marie Carrau.

We contend that Mr. Hays had no lien of any kind or character against this judgment or fund.

There was only one question before the Circuit Court at the hearing and that was the validity of the lien claimed by Mr. Hays, with the additional question of fact to determine in the event the court held that Hays had a lien, the amount, and we submit that the court went entirely outside the record when it determined any question of law or fact as between the assignee of the judgment and Mr. Russell. Mr. Russell was not before the court in any capacity except as a witness to sustain the Hays lien claim. This was an application on the part of the assignee of the judgment to compel Hays to take some action to establish his claim and the court saw fit to proceed in a summary manner to hear the question as to whether or not Hays had a lien, and this is evident from the remarks of the Circuit Court: "You are here now to show me you are entitled to the lien." (Trans. 51). The right of any other person to share in the proceeds of this judgment was not before the court and could not have been before the court in this character of a summary proceeding. Russell could not have been heard in this proceeding with reference to the Hays lien to establish any rights of lien he might have had against this judgment. If he claimed an equitable division of the proceds realized upon this judgment by reason of moneys advanced he could have been heard only upon some character of an application or petition and with notice to all others who

were similarly situated with him and who had advanced to Miss Carrau funds to carry on this litigation and hence the order of the court allowing Russell fifteen hundred dolars was made without jurisdiction and is void. (See 4 Cyc. 1005).

The Circuit Court in its memorandum decision of July 6, 1909, seemed to proceed upon the theory that the court had jurisdiction to reach an equitable adjustment, and the appellant, the assignee of the judgment and the stakeholder of the funds, could have no reasonable objection to the exercise of such power on behalf of the Circuit Court if the court had taken into consideration the rights of all those who had advanced funds to Miss Carrau to carry on this litigation, and the Circuit Court was made acquainted with the fact that there were a large number of other people who had contributed just as Mr. Russell had contributed. The witnesses testified as to a large number of other persons having contributed funds, which was conceded by Mr. Hays, and the evidence was placed before the Circuit Court to the effect that the assignment of the judgment to Robinson was for the purpose of distributing the proceeds of the judgment when collected, to the various parties who had made these contributions, including Mr. Hays, if he were able to show that he had advanced funds by reason of which he would have been entitled to a lien or to an equitable share in such proceeds.

After the fund had been collected and paid into the registry of the court, all other persons, who had not been before the court and who had advanced money, filed a verified petition and asked to be allowed to intervene and be heard with reference to the distribution of the fund. This was denied them and we were still unable to understand how the Circuit Court considered Mr. Russell before the court without any application and without any solicitor to represent him, and called only as a witness, and when the only question for hearing was whether or not Hays had a lien against this judgment. If our position be correct with reference to the jurisdictional question, then the order made by the court as to Russell was utterly void. The court in its decision announced that Hays would not be entitled to absorb the entire fund to the exclusion of his associate and Russell. The court also found that Miss Carrau agreed that Hays should be reimbursed from any fruits of the litigation, but we are unable to find from any of the contracts entered into between Mr. Hays and Miss Carrau such provision. We think an examination of Exhibits 1, 2 and 3 will convince this court that, based upon these contracts, neither Mr. Hays nor Mr. Russell had any right of lien, and in fact it has never been claimed that Mr. Russell had a lien, but it was claimed in the testimony that Russell had assigned his claim, whatever it was, for col-

lection to Mr. Hays, and the only evidence with reference to the assignment is on page 55 of the Bill of Exceptions, in which Mr. Russell testified that after the Supreme Court of the state had dismissed the will contest and awarded the property to the Irish heirs he spoke to Miss Carrau about the judgment. He says, "I assigned the claim to Mr. Hays for collection about three or four months ago, as near as I remember." The date when he was testifying was October 30, 1908, but Mr. Russell's testimony fails to establish this amount which he advanced or to show that it was advanced or used in this litigation in the Federal Court. We think the record at pages 55 to 60 shows that the money was used in the State Court and not in the Federal Court.

We ask the court's attention to the contracts, being Exhibits 1, 2 and 3, based upon which, as we understand Mr. Hays' position, he claims he is entitled to a lien for moneys advanced and that Russell also had a lien. The first exhibit (page 155), after making other provisions, says: "It is understood that whatever costs, fees or charges of the courts in such action or proceedings that may be required or advanced shall be paid by the said Marie Carrau out of said estate," and we insist that this cannot furnish the basis for a lien against a judgment for costs, even if Mr. Hays had shown sufficient evidence as to the amounts or the purposes for which used.

Exhibit No. 2 (page 156) says: "It is understood that whatever costs, fees or charges of the court in such action or proceeding that may be required to be advanced shall be deducted from the sums so recovered and the sum payable to the said Hays shall be reckoned upon said basis." So your Honors will see again that whatever moneys were advanced were to be repaid out of the estate and hence were wholly contingent and depended upon Miss Carrau establishing her rights to the estate.

Exhibit 3 (page 157) is an agreement between Carrau and Russell which Hays signed as guarantor, in which Russell loans Miss Carrau $425.00, and for the use of this money she was to pay $1,000. "And in case she shall fail and not recover any sum of said estate she agrees hereby to pay back said principal sum of $425.00 with lawful interest thereon from date until paid," which again clearly shows the minds of those individuals and no lien was contemplated, but the evidence shows that Miss Carrau, after she collected the judgment of $400, etc., under the cost bond, paid the proceeds to W. M. Russell, which repaid Russell for said $425.

Mr. Hays was wholly unable to state the amounts he claimed he had advanced or to whom he paid them or for what purpose used. On pages 82-83 Hays testified that the money secured from Mr. Russell was to

be paid back out of the estate in the event of success, and that that same condition prevailed with reference to all money that was received. On page 84 Mr. Hays admits that while he guaranteed the payment of the $425.00 he has never paid it.

The testimony of Mr. Russell as to advances made is to be found in his answer to the question as to the total sum that he had advanced:

> "A. About sixteen hundred dollars; ten hundred and fifty, the exact amount I don't know, was advanced at the first proceeding."

We submit that this is wholly insufficient to establish any amount advanced or the basis for any lien or claim whatever so far as this fund is concerned, and the strength of Hays' testimony as to the amount advanced is to be found in his cross-examination by Mr. Godfrey (pages 64 to 93), in which he admits that he never kept any books or accounts or vouchers or receipts for disbursements made in the Federal Court. He speaks of certain funds having been advanced for the joint litigation, from which we presume he meant the litigation pending in the different jurisdictions, and we submit that any moneys advanced for expenses in the State Courts, though such litigation related to the same subject matter, could not be made a lien or an equitable claim against this judgment for costs, and it is impossible to determine with any degree of certainty from the

whole of his testimony the amount of money which he even claims to have advanced, based upon which he asserts a lien against this judgment.

Your Honors understand that at the time Hays established his lien the judgment had not been collected, but after the Circuit Court held that the assignees of the judgment could enforce it, he proceeded to collect, and after crediting the amount of money collected under the cost bond and which was paid over to Russell by Miss Carrau, the execution netted $2,796.58, and all these facts were set forth in the petition of Ferguson (Trs. 26), showing the various parties and the amounts contributed along with Russell toward the expense of the litigation.

The testimony of Mr. Hays and that of Mr. Russell is wholly insufficient to enable the court to find any special amount that was advanced in this litigation by either of these individuals, or to determine therefrom the amount which Hays claimed as a lien.

As against the evidence of Hays and Russell, Marie Carrau testified (beginning on page 93) in substance, that she went to her friends and secured every dollar to meet the expenses of that litigation. She testified that when she signed the contract with Hays he told her that it provided that he, Hays, should advance all the money necessary to carry on this litigation, but that afterwards she found the con-

tract did not contain these provisions and Mr. Hays refused to furnish any money, and after that she testifies that she secured all the money and paid all the bills with reference to the litigation; that such of the bills as Hays claimed that he paid were paid with money she secured and turned over to him.

Beginning on page 99 is the following testimony:

"Q. Now, Miss Carrau, who paid for these briefs and expenses of the court from time to time as they were incurred and as they were paid?

A. I did.

Q. You paid for all of them?

A. For all of them.

Q. How about the briefs in the Supreme Court of the United States?

A. I paid for them, too."

Miss Carrau testified that she gave Mr. Hays the money which he cabled to Ireland, and on pages 103-4 she shows how she turned over to Mr. Hays one hundred fifty dollars in cash which was never used in the litigation and never repaid to her, and none of this testimony was denied by Hays.

Much of the evidence introduced on the part of Mr. Hays was wholly immaterial and related to proceedings in other courts and to business relations with reference to his employment of the late Senator Mitchell of Oregon, and such testimony was admitted over our objections, but constitutes no ground what-

ever for establishing the lien or the amounts advanced, and therefore is wholly immaterial.

These contracts make no provision as to who is to advance the money necessary to meet the costs on behalf of Miss Carrau, and if Hays or Russell did advance any money as costs in the United States Circuit Court, it created the relation of debtor and creditor only and did not provide for a lien against the judgment for costs. As a matter of law, the right of lien for moneys advanced to carry on litigation can exist only by contract, expressed or implied.

We think it must be conceded that even in this summary proceeding, if permissible at all, the same general rules apply with reference to testimony necessary to establish a lien and to foreclose it. We seriously doubt whether the court had jurisdiction to proceed at all in the manner it did. Certainly the validity of a lien, the legality and justice of the claim upon which it is based, are questions to be decided in the action to foreclose or establish the lien, and such action may or may not be brought before the court who renders the judgment upon which the lien is claimed, and our only object in applying to the court for a show cause order against Mr. Hays with reference to some claim of lien he was making was to put in motion the machinery of the court and compel Hays to action. We think Sec. 138 R. & B. Code ap-

plies only when there is some dispute between the solicitor and his client, by reason of which the solicitor claims the right to money or papers in his possession which he received from or for his client. Under this statute an attorney has a lien for compensation, but we think it is limited to that subject; so that if this proceeding is to be maintained at all, it must be upon the theory that Russell and Hays have an equitable lien against the funds, and we believe should have been heard only upon an application for distribution, in which all parties in interest were before the court.

Washington has an attorney's lien, found in Sec. 136, Vol. 1, R. & B. Code, being Sec. 4772, B. C., but we submit that this statute applies only to *compensation,* and does not include advances made by the solicitor for the client and cannot furnish the basis for a claim either in law or equity against the judgment, unless by agreement between the parties. Sec. 137 relates to proceedings to compel the delivery of papers, and Sec. 138 relates to proceedings where a lien exists. There is no claim made here as to compensation. Mr. Hays sought to establish a lien against this judgment solely upon the ground that he had advanced cost money from time to time to assist in the litigation, and in this we think the testimony is wholly insufficient, even if he had the right of lien.

We submit that none of these parties who advanced the money to Miss Carrau have a claim by way of lien or any right to insist upon this judgment for costs being distributed to them, but Miss Carrau, with her high sense of honor and justice, assigned this judgment to Robinson for the purpose of having it collected and distributed pro rata to all those, including Russell, who had advanced her funds, and she had a right to concede this to these friends, and based thereon upon the record and all the testimony and upon the petition filed for that purpose, it was the duty of the court to determine that neither Hays nor Russell had any lien against this judgment, but in harmony with the wishes of Miss Carrau the Circuit Court should have entered an order distributing the fund to those parties, but instead, he entered an order or judgment granting to Russell a lien and distributing to him $1,790, and to Hays $496.33, which we submit was without authority of law, and that the orders and judgments with reference to this lien fund should be reversed and the Circuit Court directed to distribute the fund in accordance with the wishes of Marie Carrau.

JAMES J. GODFREY,
J. W. ROBINSON,
Solicitors for Appellant.

ON MOTION TO DISMISS APPEAL.

The appellees have filed a motion to dismiss this appeal upon two grounds:

A. Because the appellant waived his right of appeal.

B. Because the relief granted by the Circuit Court was upon his application.

We submit that the record does not support either theory. In the first place appellant merely applied to the court to require Hays to proceed in such manner as he might elect to establish his claim of lien, and, as we contend, that was the only question before the court. Hays had been claiming a lien against the judgment and claiming the right to control the enforcement of the judgment, and after waiting for many months the appellant applied to the court to require Hays to act, and the court issued an order requiring him to show cause on a certain date why he did not proceed, and on that date the court proceeded in a summary manner to pass on the question of the lien, and in doing so also directed what was in effect a distribution of the fund when the judgment should be collected. This decision was filed on July 6, 1909, which authorized Robinson to

collect the judgment, which he did, and on October 15, 1909, execution was issued, a levy made, and then the judgment was paid and Robinson caused the same to be placed in the registry of the court, as he supposed, to await a regular order of distribution, and the appellant then filed in the court a petition in intervention on behalf of all those who had contributed cash to meet the expenses of this litigation waged by Miss Carrau against the Irish heirs, and also applied to the court for a reconsideration of his decision of July 6, 1909, in so far as it attempted to determine to whom the fund should be distributed when collected (see Trans. 25 to 36, incl.), and all such relief was denied (Trans 38-9-43), whereupon the said Robinson presented to the court a petition, etc., for an appeal, and the same was allowed (Trs. 121-131, incl.).

It will be noticed that the appeal is not only from the judgment establishing a lien in favor of Hays and Russell, but from all orders thereafter made with reference to the fund, but the appeal proper and the principal question on appeal was and is as to the validity of Hays' and Russell's claim of lien.

All these orders were final orders from which an appeal might be prosecuted.

The court having established a lien on behalf of Russell for $1,500 and having determined that Hays

was entitled to one-half of the remainder, as shown by the memorandum decision (Trs. 6), which was finally modified (Trs. 16) when the court directed the distribution of the fund by an appealable order in which he directed the clerk to retain the sum total taxed as witness fees, and this was the only order of distribution, the memorandum decision of July 6, 1909, not being an order of distribution and not being a final order was not appealable.

In the memorandum decision of July 6, 1909, the court did not attempt to find the exact amount due Russell, except to say that Russell loaned the total sum of $1,500, including the loan of $425 guaranteed by Hays, and in his order of distribution (Trs. 16) he directed the clerk to

> "Distribute and pay over to the parties or their attorney the moneys derived under execution for costs herein now in the registry of this court in accordance with the terms and provisions of the decision of this court filed herein on the 6th day of July, 1909."

But Russell withdrew $1,790, and how this amount was determined the record fails to disclose, and Hays drew $496.33, which was the one-half of the judgment collected after deducting the witness fees, which left something like $500 in the registry of the court to be finally distributed to Robinson as the stakeholder, with reference to which there was no dispute, and the appellant as such stakeholder, having

been authorized by the parties to whom the money belonged to prosecute the appeal and to use the money in the registry of the court for that purpose, applied to the court for an order directing the clerk to pay the court expenses of this appeal out of that portion of the fund (Sup. Trs. 143-5), and because of the application of a portion of the money remaining in the registry of the court appellees claim that the appellant acquiesced in the judgment of distribution. We submit that there is no reasonable ground for such contention. The appellant sought only to realize on the judgment and to have the fund distributed in accordance with the terms and conditions under which the judgment was assigned to him, and that he at no time acquiesced directly or indirectly in the judgment of the court, or in the order of distribution, or in the order fixing the validity of the lien, and every move that he made, as shown by this record, was for the purpose of preserving the rights of all the persons for whom he was acting as stakeholder.

JAMES J. GODFREY,
J. W. ROBINSON,
Solicitors for Appellant.

1861

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee, etc.,
Appellant,

vs.

W. F. HAYS and W. M. RUSSELL,
Appellees.

RESPONDENTS' ANSWERING BRIEF

Appeal from the United States Circuit Court of the District of Washington, Western Division.

REYNOLDS, BALLINGER & HUTSON and
W. F. HAYS,
Attorneys for Respondents.

Lowman & Hanford Co. Seattle, Wash.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. W. ROBINSON, as Assignee, etc.,
Appellant,

vs.

W. F. HAYS and W. M. RUSSELL,
Appellees.

RESPONDENTS' ANSWERING BRIEF.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Appellant seeks to escape the Court's order made upon his own application distributing the proceeds of a judgment for costs; appellant, at the same time, appropriating the proceeds which said order allotted to him.

1. An order entered upon the application of a party is binding upon such party, and is not appealable. (See authorities in *brief* on motion to dismiss appeal.)

2. Where a party accepts the fruits of such an order, it is thereby conclusive; therefore this appeal should be dismissed. (See authorities in *brief* on motion to dismiss.

On the Merits.

The true record facts of the case in which the judgment for the costs was entered, which in Appellant's "Statement" is *covertly* materially distorted, shows that Hays, respondent in this case, was the attorney for Marie Carrau, the respondent in that case, and in whose favor the judgment was rendered for costs, for some $2,600. The said Marie Carrau, by her written contract, was to pay Hays one-half the recovery, *after the payment of all advanced costs;* that Hays *advanced* said costs and *duly filed his lien* therefor on said judgment as such attorney. (See Supplemental Transcript, pp. 152-191). That sometime *after* Hays had so *filed his lien* the said Marie Carrau, without notice to Hays, made an absolute assignment in writing of said judgment to Appellant Robinson. (See Assignment, pp. 4-5.)

Thereafter, while Hays was endeavoring to compel payment of said judgment, appellant petitioned the Court to cite Hays to show his *right* to said lien to said judgment. Hays thereupon showed by ample proof, satisfactory to the Court, that in addition to

his *own* cash advances so claimed by him, Respondent Russell had also advanced some $1,600 about the year 1902, which Hays had necessarily paid out, and re-payment of which sum with interest was guaranteed by Hays to said Russell. The Court found that $1,500, with interest, was due Russell from Hays from said fund, but required Hays to accept of said fund one-half of the sum remaining after payment to Russell of $1,500, with interest, giving Robinson the other half so remaining, in all about $500 each to Robinson and Hays.

Adroit attempts were made by Robinson, after he had instituted his proceeding aforesaid, to make it appear that he, Robinson, had taken such assignment as a "trustee" for *all* who had loaned money to the said Marie Carrau; but there was absolutely no proof that said assignment was made or *intended* by Marie Carrau to be made to Robinson as a "stakeholder," as he was pleased later to denominate himself. (See Transcript, pp. 4-5.)

The intention of such assignment to him was manifestly and really to *defraud* Hays out of all his personal advancements, about $1,040, in addition to the sums so advanced by Russell. Hays should therefore have received the full sum he individually advanced for her as claimed in his written lien, in addition to the sum awarded as due to Russell, which sum Russell had long before this proceeding duly assigned to Hays as attorney in the case to obtain for him, Russell, out of said judgment. Robinson therefore by accepting and taking the money thus award-

ed him by the Court pursuant to the assignment of said judgment by the said Marie Carrau, thereby tricked and defrauded Hays out of the sum of $496.33, which sum Robinson has received, or the most of said sum as shown by *Supplemental Transcript,* pp. 143-146.

The Court below was possessed of full power upon the application of Robinson, the assignee of the judgment, to make an order distributing the same, and when so made said order was binding upon said assignee. Furthermore, he became bound by said order when he accepted the fruits thereof.

Respectfully submitted,

REYNOLDS, BALLINGER & HUTSON
and
W. F. HAYS,
Attorneys for Respondents.

No. 1863

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation), (Plaintiff),

Plaintiff in Error,

vs.

CHARLES H. LILLY, Doing Business as C. .H LILLY & COMPANY (Defendant),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1863

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation), (Plaintiff),

Plaintiff in Error,

vs.

CHARLES H. LILLY, Doing Business as C. .H LILLY & COMPANY (Defendant),

Defendant in Error.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff in Error,

vs.

CHAS. H. LILLY, Doing Business as C. H. LILLY & CO.,

Defendant in Error.

Order Extending Time on Transcript.

Now, on this 9th day of May, 1910, upon application and consent of counsel, and for sufficient cause appearing, it is by me ordered that the time within which the Clerk of this Court shall prepare, certify and transmit to the United States Circuit Court of Appeals for the 9th Circuit transcript of the record on appeal in this cause be and the same is hereby extended to and including the 15th day of June, 1910.

C. H. HANFORD,

Judge.

[Endorsed]: No. 1761. In the Circuit Court of the United States for the Western District of Washington. California Fruit Canners' Association, a Corporation, vs. Chas. H. Lilly, Doing Business as C. H. Lilly & Co. Order Extending Time on Transcript. Filed U. S. Circuit Court, Western District

of Washington. May 9, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

G. O. B.—3—2.

No. 1863. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time. Filed Jun. 10, 1910. F. D. Monckton, Clerk.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff in Error,

vs.

CHAS. H. LILLY, Doing Business as C. H. LILLY & CO.,

Defendant in Error.

[Names and Addresses of] Counsel.

WILLIAM H. GORHAM, Esquire, Mutual Life Bldg., Seattle, Wash., Attorney for Plaintiff in Error.

J. H. ALLEN, Esquire, Maynard Blk., Seattle, Wash., W. A. PETERS, Esquire, New York Blk., Seattle, Wash., Attorneys for Defendant in Error.

[Summons.]

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Western District of Washington.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHAS. H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Action brought in the said Circuit Court and the Complaint filed in the office of the Clerk of said Circuit Court in the City of Seattle, County of King, State of Washington.

WILLIAM H. GORHAM,
Mutual Life Building, Seattle, Washington,
Plaintiff's Attorney.

The President of the United States of America, Greeting: To Charles H. Lilly, Doing Business as C. H. Lilly & Company.

You are hereby summoned to appear in the Circuit Court of the United States, for the Western District of Washington, at the City of Seattle, within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, now

on file in the office of the Clerk of said Court, a copy of which complaint is herewith served upon you.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the seal of said Circuit Court, this 15th day of April, 1909.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within entitled action, upon the within named defendant by delivering to and leaving a true copy of the said summons and complaint with Charles H. Lilly, doing business as C. H. Lilly & Co., at Seattle, Washington, on April 15, 1909.

C. B. HOPKINS,
United States Marshal.
By H. V. R. Anderson,
Deputy.

April 15, 1909.
Marshal's Fees: $2.12.

[Endorsed]: Summons. Filed U. S. Circuit Court, Western District of Washington, Apr. 15, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & CO.,

Defendant.

Complaint.

The plaintiff complains and alleges for a first cause of action:

I.

That during all of the times herein mentioned it was and now is a corporation organized and existing under the laws of the State of California, and a citizen and resident thereof.

II.

That during all of the times herein mentioned Charles H. Lilly was and now is a citizen of the State of Washington, and a resident of the city of Seattle, King County, State of Washington, doing business as C. H. Lilly & Company.

III.

That defendant is indebted to plaintiff in the sum of Nineteen Thousand One Hundred Eighty-five and 87/100 Dollars ($19,185.87), with interest thereon from April 29, 1908, at the rate of seven per cent

(7%) per annum, upon the balance of an account for goods, wares and merchandise sold and delivered by plaintiff to defendant between the 12th day of July, 1907, and the 31st day of December, 1907, according to the terms and conditions of three (3) several written contracts entered into by and between plaintiff and defendant at San Francisco, California, of date July 12, 18 and 31, respectively, 1907, copies of which said contracts are hereto annexed, marked "Exhibits A, B, and C," respectively, hereby referred to and made a part hereof.

IV.

That defendant has not paid said sum of $19,185.-87, nor any part thereof.

And for a second cause of action:

I.

That during all of the times herein mentioned it was and now is a corporation organized and existing under the laws of the State of California, and a citizen and resident thereof.

II.

That during all of the times herein mentioned Charles H. Lilly was and now is a citizen of the State of Washington and a resident of the city of Seattle, King County, State of Washington, doing business as C. H. Lilly & Company.

III.

That on, to wit, the 29th day of April, 1908, at San Francisco, California, an account was stated between plaintiff and defendant upon which statement a balance was found to be due from defendant to

plaintiff of Nineteen Thousand One Hundred and Eighty-five and 87/100 Dollars ($19,185.87).

IV.

That defendant then and there agreed to pay the said balance of $19,185.87.

V.

That defendant has not paid the same nor any part thereof.

Wherefore plaintiff demands judgment against defendant in the sum of Nineteen Thousand One Hundred Eighty-five and 87/100 Dollars ($19,185.-87), together with interest thereon at the rate of seven per cent (7%) per annum from April 29th, 1908, and its costs and disbursements to be taxed.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Exhibit "A" [to Complaint].

FRUIT and/or VEGETABLE CONTRACT
as per Specifications on Reverse Side.

Terms: Payable in New York or San Francisco Exchange, on presentation of invoice with documents attached.

Conditions: The above prices are for goods "Free on Board" at Factory. On account of shipments from different factories, the seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

Seller shall not be liable for short, late or non-delivery of goods resulting from damage to crop, strikes, fire, flood, unavoidable casualties or other circumstances beyond its control, save that a proportionate delivery shall be made to all buyers, without

discrimination of the suitable stock remaining in seller's possession after the said crop damage, strike, fire, flood, or other uncontrollable circumstance.

Goods to be shipped when ready; Peas to be billed and paid for not later than July 1st: TOMATOES to be billed and paid for not later than November 1st. FRUITS remaining unshipped on December 31st following the date of this contract, shall be billed and paid for as of that date. Any goods above described remaining unshipped when billed, shall be paid for against warehouse receipt and shall be stored and insured in selected Insurance Companies for buyer's account against loss or damage by fire for 75 per cent of invoice cost. Buyer to pay two cents per case per month for No. 1, No. 2, No. 2½, and No. 3 cases, and three cents per case per month for No. 8 cases to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt.

Swells: All goods (except Currants and Gooseberries) guaranteed against swells until July 1st of the year following that in which the goods were packed, but all claims must be made, and bill rendered for the same prior to the date aforesaid, and goods held subject to the order of the seller. At seller's option the goods may be returned by freight to California, and seller will then pay the original invoice prices for the goods with freight added. Claims other than swells must be presented within ten (10) days from the receipt of the goods.

This Contract to be binding upon the seller must be confirmed in writing by the California Fruit

Canners' Association, which, however, shall not be responsible for the performance thereof, unless a copy, properly signed by the buyer is delivered to the seller within *twn* days of the date thereof.

Buyer: C. H. LILLY & COMPANY.
F. R. BECKHAM,
Seller: CALIFORNIA FRUIT CANNERS' ASSOCIATION.
By C. H. BENTLEY,
Manager Sales Department.

Broker:

To be invoiced through Griffith Durney Co.

Contract.

California Fruit Canners' Association,
San Francisco, Cal.

Sold to C. H. Lilly Co.

Date July 12/07. 1202

Address Seattle, Wash. Seller's Copy.

No. 1823. Folio 203.

Cases.	Dozen.	Size.	Brand	Grade.	Varieties.	Price per Doz. Net.
5000	No.	2 ½	Std.		Tomatoes	80
300		8	"		"	225
5300						

F. O. B. Factory Seller's Option.

	No. 2½	No. 8
Shipped		225
Warehoused	4250	75
	4250	300
	85%	100%

Exhibit "B" [to Complaint].

FRUIT and/or VEGETABLE CONTRACT

as per Specifications on Reverse Side.

Terms: Payable in New York or San Francisco Exchange, on presentation of invoice with documents attached.

Conditions: The above prices are for goods "Free on Board" at Factory. On account of shipments from different factories, the seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

Seller shall not be liable for short, late or non-delivery of goods resulting from damage to crop, strikes, fire, flood, unavoidable casualties or other circumstances beyond its control, save that a proportionate delivery shall be made to all buyers, without discrimination, of the suitable stock remaining in seller's possession after the said crop damage, strike, fire, flood, or other uncontrollable circumstance.

Goods to be shipped when ready; PEAS to be billed and paid for not later than July 1st: TOMATOES to be billed and paid for not later than November 1st. FRUITS remaining unshipped on December 31st following the date of this contract shall be billed and paid for as of that date. Any goods above described remaining unshipped when billed, shall be paid for against warehouse receipt and shall be stored and insured in selected Insurance Companies for buyer's account against loss or damage by fire for 75 per cent of invoice cost.

Buyer to pay two cents per case per month for No. 1, No. 2, No. 2½ and No. 3 Cases, and three cents per case per month for No. 8 cases to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt.

Swells: All goods (except Currants and Gooseberries) guaranteed against swells until July 1st of the year following that in which the goods were packed, but all claims must be made, and bill rendered for the same prior to the date aforesaid, and goods held subject to the order of the seller. At seller's option the goods may be returned by freight to California, and seller will then pay the original invoice prices for the goods with freight added. Claims other than swells must be presented within ten (10) days from the receipt of the goods.

This contract to be binding upon the seller must be confirmed in writing by the California Fruit Canners' Association, which, however, shall not be responsible for the performance thereof, unless a copy, properly signed by the buyer is delivered to the seller within ten days of the date thereof.

Buyer: C. H. LILLY & COMPANY,
F. R. BECKHAM.

Seller: CALIFORNIA FRUIT CANNERS ASSOCIATION.
By C. H. BENTLEY,
Manager Sales Department.

CONTRACT.

Broker: Kelly-Clarke Co.,
California Fruit Canners Association,
San Francisco, Cal.

Sold to Messrs. C. H. Lilly & Co. Date July 18, '07.
1203

Address Seattle, Wash. Seller's Copy

No. 2994. Folio.
204

Remarks: Shipment as soon as packed. Seller's option. The unshipped portion to be billed and paid for Nov. 1st, 1907.

Terms: Net Cash.

Cases.	Dozen.	Size.	Brand.	Grade.	Varieties.	Price per Doz.
5000	10000	2½ lbs.	"RAMONA"	Stand.	Tomatoes	.80
300	300	No. 8	"RAMONA"	Stand	Tomatoes	2.25
5300						

In the event that shipments are made from interior points the C. F. C. A. guarantee that the freight rate to San Francisco, including transfer will not exceed $2.00 per ton.

	No. 2½	No. 8
Shipped	3450	225
Warehoused	800	75
	4250	300
	85%	100%

Complained very much of the tomatoes shipped them last year under the Ramona brand.

See letter from R. C. Co. July 24/07.

Exhibit "C" [to Complaint].

FRUIT and/or VEGETABLE CONTRACT

as per Specifications on Reverse Side.

Terms: Cash less 1½ per cent payable in New York or San Francisco Exchange, on presentation of invoice with documents attached.

Conditions: The above prices are for goods "Free on Board" San Francisco. On account of shipments from different factories, the seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

Seller shall not be liable for short, late or non-delivery of goods resulting from damage to crop, strikes, fire, flood, unavoidable casualties or other circumstances beyond its control, save that a proportionate delivery shall be made to all buyers, without discrimination, of the suitable stock remaining in seller's possession after the said crop damage, strike, fire, flood, or other uncontrollable circumstance.

Goods to be shipped when ready: PEAS to be billed and paid for not later than July 1st: TOMATOES to be billed and paid for not later than November 1st. FRUITS remaining unshipped on December 31st following the date of this contract, shall be billed and paid for as of that date. Any goods above described remaining unshipped when billed, shall be paid for against warehouse receipt and shall be stored and insured in selected Insurance

Companies for buyer's account against loss or damage by fire for 75 per cent of invoice cost. Buyer to pay two cents per case per month for No. 1, No. 2, No. 2½ and No. 3 Cases, and three cents per case per month for No. 8 cases to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt.

Swells: All goods (except Currants and Gooseberries) guaranteed against swells until July 1st of the year following that in which the goods were packed, but all claims must be made, and bill rendered for the same prior to the date aforesaid, and goods held subject to the order of the seller. At seller's option the goods may be returned by freight to California, and seller will then pay the original invoice prices for the goods with freight added. Claims other than swells must be presented within ten (10) days from the receipt of the goods.

This Contract to be binding upon the seller must be confirmed in writing by the California Fruit Canners' Association, which, however, shall not be responsible for the performance thereof, unless a copy, properly signed by the buyer is delivered to the seller within ten days of the date thereof.

Buyer: C. H. LILLY & COMPANY,
F. R. BECKHAM.

Seller: CALIFORNIA FRUIT CANNERS ASSOCIATION.
By C. H. BENTLEY,
Manager Sales Department.

CONTRACT.

Broker: Kelly-Clarke Co.

California Fruit Canners Association,
San Francisco, Cal.

Sold to C. H. Lilly & Co.

Date July 31st, 1907, 1294.

Address: Seattle, Wash.

Seller's Copy
Folio
312.

Remarks: Special 5% No. 2310.

Cases.	Dozen.	Size.	Brand.	Grade.	Varieties.	Price per Doz.
250	500	2½ lbs.	"Ramona"	Stand	Apricots...	1.80
300	600	2½ lbs.	"Ideal"	Second	Apricots	1.50
200	400	2½ lbs.	Unlabeled	Special	Apricots ..	2.75
500	500	No. 8	"C. F. C. A."	Pie	Pld. Y. F. Peaches	4.00
350	700	2½ lbs.	"Ramona"	Stand	Y. F. Peaches	1.65
250	500	2½ lbs.	"Ramona"	Stand	L. C. Peaches	1.85
350	700	2½ lbs.	"Ideal"	Second	Y. F. Peaches	1.45
200	400	2½ lbs.	"Ideal"	Second	L. C. Peaches	1.65
350	700	2½ lbs.	Unlabeled	Special	L. C. "	2.60
250	500	2½ lbs.	Unlabeled	Special	Y. F. "	2.25
100	200	2½ lbs.	"Rose City"	Extras	L. C. "	2.40
100	200	2½ lbs.	"Rose City"	Extras	Y. F. "	2.00
150	300	2½ lbs.	Unlabeled	Spec.	Sliced L. C. Peaches	2.60
100	100	No. 8	"C. F. C. A."	Pie	Grapes ..	3.00

3450

F. O. B. Frisco. Except Extra Peaches.

CONTRACT.

Broker: Kelley-Clarke Co.

California Fruit Canners' Association,
San Francisco, Cal.

No. 2.

Sold to C. H. Lilly & Co. (continued).

Date July 31st, '07.

1205

Seller's Copy

Folio.

312

(2310) Seattle, Wash.

Remarks. Special 5%.

Cases.	Dozen.	Size.	Brand.	Grade.	Varieties.	Price per Doz.
3450.						
200	200	No. 8	"C. F. C. A."	Pie	Assorted	3.10
					Assortment No. 2	
					1 Apple	
					2 Unpld. Peaches	
					2 Pumpkin	
					1 Apricot	
					2 Unpld. Pears	
					2 Grapes	
					2 Plums	
150	300	2½ lbs.	"RAMONA"	Stand	Pears	1.80
100	200	2½ lbs.	"IDEAL"	Second	Pears	1.65
250	250	No. 8	Sol. Pk.	Sol. Pk.	....	
					Blackberries	4.75

4150

100 2 lbs. flat R. H. Extra Slice Pineapple 1.75
(See Spec. No. 3850)

4250.

United States of America,
Western District of Washington,—ss.

William H. Gorham, being first duly sworn, on oath says: That he is attorney for plaintiff in the above-entitled action; that he has heard the foregoing Complaint read, knows the contents thereof, and believes the same to be true, and that he makes this affidavit on behalf of plaintiff because none of the officers of plaintiff are within said District.

WILLIAM H. GORHAM.

Subscribed and sworn to before me this 15th day of April, A. D. 1909.

[Seal] S. H. KELLERAN,
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

Service of all subsequent papers in the within named action, except writs and process, may be made upon plaintiff by leaving the same with William H. Gorham, as attorney for said plaintiff, at 513 Mutual Life Building, Seattle, Washington.

WILLIAM H. GORHAM,
Atty. for Pltf.

[Endorsed]: Complaint. Filed U. S. Circuit Court, Western District of Washington. Apr. 15, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court, for Northern Division, Western District, Washington.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSN. (a Corporation),

Plaintiff,

vs.

CHAS. H. LILLY,

Defendant.

Motion to Require Plaintiff to Elect, etc.

Comes now the above-named defendant and moves the Court for an order requiring the plaintiff herein to elect upon which cause of action set forth in the complaint he will sue on, and that after the plaintiff shall have made such election that the other cause of action be stricken from the complaint.

J. H. ALLEN,
Attorney for Defendant.

We hereby acknowledge receipt of a copy and service of the within motion to elect, this 6th day of May, 1909.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

[Endorsed]: Motion to Compel Pltf. to Elect. Filed U. S. Circuit Court, Western District of Washington. Jul. 30, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

Circuit Court of the United States, for the Northern Division of Washington.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,

Plaintiff,

vs.

CHAS. H. LILLY CO.,

Defendant.

Order [Granting Motion Requiring Plaintiff to Elect etc.].

This cause coming on to be heard upon the defendant's motion to require the plaintiff to elect as to which of the two causes of action set forth in the complaint he will rely upon and the parties appearing in court by their respective counsel, and the Court having heard the argument, it is ordered that the said motion be and the same hereby is granted; to which order plaintiff excepts and its exception allowed.

Done in open court this the 30th day of August, 1909.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed U. S. Circuit Court, Western District of Washington, Aug. 30, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Amended Complaint.

The plaintiff complains and alleges:

I.

That during all of the times herein mentioned it was and now is a corporation organized and existing under the laws of the State of California and a citizen and resident thereof.

II.

That during all of the times herein mentioned Charles H. Lilly was and now is a citizen and resident of the State of Washington, doing business as C. H. Lilly & Company, at Seattle, King County, State of Washington.

III.

That on, to wit, the 29th day of April, 1908, at San Francisco, California, an account was stated in writing between plaintiff and defendant, upon which statement a balance was found to be due from defendant to plaintiff in the sum of nineteen thousand

one hundred and eighty-five and 87/100 ($19,185.87) dollars.

IV.

That defendant thereupon agreed to pay plaintiff said sum of nineteen thousand one hundred and eighty-five and 87/100 ($19,185.87) dollars.

V.

That defendant has not paid the same, or any part thereof.

Wherefore, plaintiff demands judgment against defendant in the sum of nineteen thousand one hundred and eighty-five and 87/100 ($19,185.87) dollars, together with interest thereon at the legal rate from April 29th, 1908, and for its costs and disbursements herein to be taxed.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

United States of America,
Western District of Washington,—ss.

William H. Gorham, being first duly sworn, on oath says: That he is the Attorney for plaintiff in the above-entitled action; that he has heard the foregoing amended complaint read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of plaintiff and because none of the officers of plaintiff are within said Western District of Washington.

WILLIAM H. GORHAM,

Subscribed and sworn to before me this 14th day of September, A. D. 1909.

[Seal] WILLIAM B. WEBB,
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

Copy within Am. Complaint, received this 14th day of September, 1909.

JOHN H. ALLEN,
Atty. for Deft.

[Endorsed]: Amended Complaint. Filed U. S. Circuit Court, Western District of Washington. Sep. 14, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Answer.

Comes now the defendant and answering the amended complaint herein.

I.

Defendant now having knowledge or information sufficient to form belief as to the truth of the allega-

tions in paragraph 1, denies upon information and belief each and every allegation therein contained.

II.

Defendant denies each and every allegation in paragraph 3.

III.

Defendant denied each and every allegation in paragraph 4.

And for a first further affirmative defense defendant says:

I.

That during all the times herein stated the plaintiffs being then and there an association of a large number of growers and canners of fruits and vegetables in the State of California, combined together for the purpose and with the intent to control the market for such products and to keep up the price of said commodities, that whether said association is or was during said times a duly organized or legally constituted corporation of the State of California or of any other State this defendant is not informed.

II.

That the said plaintiffs during all of said times have been and are now doing business in the State of Washington. That they have an office and agents within this State, to-wit, in the city of Seattle, within said State, but that they have not complied with the statutes thereof in filing the appointment of their agent with the Secretary of State.

III.

That on or about, to wit, the 4th day of May, 1908,

the said plaintiffs with the intention to cheat and defraud this defendant represented to this defendant that they had on hand a large quantity of canned vegetables and fruits of standard, special, extras, and other grades all first class in their respective grades in quality, and had stored in warehouses subject to the order of this defendant said goods, and in consideration thereof and relying upon the truth of said statements and representations this defendant agreed to pay the value thereof.

IV.

That thereafter, after the promises aforesaid, this defendant discovered and alleges the fact to be that said representations, undertakings and promises on the part of the plaintiff were false and untrue, and were known at the time so uttered by the said plaintiff to be false and untrue. That the said plaintiff did not have said goods in quantity as aforesaid at said time or at any other time in their said warehouse subject to the order of this defendant that the goods that the said plaintiff did have on hand were not of the quality represented by the said plaintiff but of inferior, unsalable and worthless goods.

V.

That subsequent to the promises and undertaking of the defendant as aforesaid this defendant discovered said goods were not of the quality so falsely and fraudulently represented by the plaintiff, this defendant called plaintiff's attention thereto, and in the presence of the plaintiff opened and caused plaintiff to inspect said goods or a portion thereof.

The plaintiff then and there admitted and confessed that said goods were not of the quality and grade represented to this defendant by the said plaintiff, agreed and undertook to remedy the said defects and to reimburse defendant for any damages or injury caused the defendant by reason of such goods being deficient in quality; that notwithstanding said agreement the plaintiffs have neglected, failed and refused to comply with their said agreement and undertaking.

And for a second and further defense and counterclaim this defendant alleges:

I.

That during all the times herein stated the plaintiffs being then and there an association of a large number of growers and canners of fruits and vegetables in the State of California, combined together for the purpose and with the intent to control the market for such products and to keep up the price of said commodities, that whether said association is or was during said times a duly organized or legally constituted corporation of the State of California or of any other State, this defendant is not informed.

II.

That the said plaintiffs during all of said times have been and are now doing business in the State of Washington. That they have an office and agents within this State, to wit, in the city of Seattle, within said State, but that they have not complied with the statutes thereof in filing the appointment of their agent with the Secretary of State.

III.

That on or about, to wit, the 4th day of May, 1908, the said plaintiffs with the intention to cheat and defraud this defendant represented to this defendant that they had on hand a large quantity of canned vegetables and fruits of standard, special, extras, and other grades all first class in their respective grades in quality, and had stored in warehouses subject to the order of this defendant said goods, and in consideration thereof and relying upon the truth of said statements and representations this defendant agreed to pay the value thereof.

IV.

That thereafter after the promises aforesaid this defendant discovered and alleges the fact to be that said representations, undertakings, and promises on the part of the plaintiff were false and untrue, and were known at the time so uttered by the said plaintiff to be false and untrue. That the said plaintiff did not have said goods in quantity as aforesaid at said time or at any other time in their said warehouse subject to the order of this defendant; that the goods that the said plaintiff did have on hand were not of the quality represented by the said plaintiff but of inferior, unsalable and worthless goods.

V.

That subsequent to the promises and undertakings of the defendant as aforesaid this defendant discovered said goods were not of the quality so falsely and fraudulently represented by the plaintiff, this defendant called plaintiff's attention thereto, and in

the presence of the plaintiff opened and caused plaintiff to inspect said goods or a portion thereof. The plaintiff then and there admitted and confessed that said goods were not of the quality and grade represented to this defendant by the said plaintiff, agreed and undertook to remedy the said defects and to reimburse defendant for any damages or injury caused the defendant by reason of such goods being deficient in quality; that notwithstanding said agreement the plaintiffs have neglected, failed and refused to comply with their said agreement and undertaking.

VI.

That the defendant, before discovering that said goods were not up to quality, received and paid the said plaintiff for a large quantity of said goods and sold and distributed the same to customers of the said defendant, representing to the said customers that said goods were of the grade and quality so as aforesaid represented by the plaintiffs to this defendant. That thereafter and subsequent to the rendition of the account by the said plaintiffs to this defendant as claimed by plaintiffs, said goods were by the customers of this defendant repudiated and in many instances returned to this defendant. The customers of this defendant as aforesaid refused to pay for same. That in consequence thereof and by reason of the falling off and deficiency of the grade and quality of said commodities the business of this defendant was greatly and largely damaged, to wit, the sum of Twenty-five Thousand Dollars ($25,000).

Wherefore defendant asks for judgment against the plaintiff for the sum of Twenty-five Thousand

Dollars ($25,000), interest and his costs in this behalf expended.

J. H. ALLEN,
Attorney for Defendant.

State of Washington,
County of King,—ss.

J. H. Allen, being first duly sworn, upon his oath, says, that he is the attorney for the defendant herein in the above-entitled action; that he has heard the foregoing answer read; knows the contents thereof, and believes the same is true; that he makes this affidavit because the said defendant is not at this time within the county of King, and State of Washington.

J. H. ALLEN.

Subscribed and sworn to before me this the 1st day of October, 1909.

WALTER B. ALLEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Answer. Filed U. S. Circuit Court, Western District of Washington. Oct. 4, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

We hereby acknowledge receipt of a copy of the within Answer this 1 day of Oct., 1909.

WILLIAM H. GORHAM,
Attorney for Pltf.

In the United States Circuit Court, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION, (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Reply.

Comes now the plaintiff, and for a reply to defendant's answer herein says:

I.

It denies each and every allegation contained in the first further affirmative defense of said Answer.

II.

It denies generally each and every allegation contained in the second and further defense and counterclaim of said Answer, and denies that defendant was damaged in the sum of Twenty-five Thousand Dollars or in any sum whatever.

Wherefore, plaintiff demands judgment as in its amended complaint demanded.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

United States of America,
Western District of Washington,—ss.

William H. Gorham being first duly sworn, on oath says: That he is attorney for plaintiff company in the above-entitled action; that he has heard the foregoing Reply read, knows the contents thereof, and believes the same to be true; that he makes this affidavit because none of the officers of plaintiff company are within said District.

WILLIAM H. GORHAM.

Subscribed and sworn to before me this 5th day of October, A. D. 1909.

[Seal] EDWARD H. FLEECK,
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

Copy of within Reply received this 5 day of Oct., 1909.

JOHN H. ALLEN,
Atty. for Deft.

[Endorsed]: Reply. Filed U. S. Circuit Court, Western District of Washington, Oct. 6, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION, (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Motion [to Amend Reply].

Comes now the plaintiff and moves the Court for leave to amend its reply, heretofore filed herein, by striking therefrom, in the second paragraph thereof, the words:

"And denies that defendant was damaged in the sum of $25,000 or in any sum whatever."

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of within motion received this 23 day of Dec., 1909.

JOHN H. ALLEN,
Atty. for Deft.

[Endorsed]: Motion to Amend Reply. Filed U. S. Circuit Court, Western District of Washington, Dec. 23, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Order [Granting Motion to Amend Reply].

This cause coming on for hearing on the motion of plaintiff for leave to amend its reply heretofore filed herein by striking therefrom, in the second paragraph thereof, the words:

"And denies that defendant was damaged in the sum of $25,000 or in any sum whatever."

—it appearing that due notice of the hearing of said motion at this time and place has been given defendant; the Court being fully advised in the premises:

It is ordered that said motion be and the same is hereby granted.

Dated Jany. 3, 1910.

C. H. HANFORD,
Judge.

Copy within Order received this 23 day of Dec., 1909.

JOHN H. ALLEN,
Atty. for Deft.

[Endorsed]: Order Granting Leave to Amend. Filed U. S. Circuit Court, Western District of Washington, Jan. 3, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS ASSOCIATION, (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Affidavit [of William H. Gorham in Support of Motion Re Inspection, etc.].

State of Washington,
County of King,—ss.

William H. Gorham, being duly sworn on oath says: That he is the attorney for plaintiff in the above-entitled cause; that on this 20th day of September, as attorney for plaintiff herein, he was served with a written demand for copy by attorney for defendant, a copy of which demand is hereto attached, marked Exhibit "A," hereby referred to and made a part hereof.

That this affiant has been advised by plaintiff, verily believes and states the facts to be, that on

April 29, 1908, at San Francisco, California, plaintiff made and rendered defendant a statement of account between plaintiff and defendant, showing a balance due from defendant to plaintiff in the sum of $19,185.87, and on said date forwarded said statement by mail to defendant at Seattle, Washington, in a letter, dated April 29, 1908, referring to and inclosing said statement therein; that defendant received said letter and said statement of account in due course of mail at Seattle, Washington, and that defendant ever since said last named date has had and now has in his possession or under his control said statement of account, together with said letter; that said statement above referred to is the same statement referred to in the third paragraph of plaintiff's amended complaint herein, a copy of which and a view and inspection of which defendant now demands as aforesaid.

That said original statement and letter are documents containing evidence relating to the merits of plaintiff's action herein.

WILLIAM H. GORHAM.

Subscribed and sworn to before me this 20th day of September, 1909.

[Seal] E. LINES,

Notary Public in and for the State of Washington, Residing at Seattle, Wash.

Exhibit "A" [to Affidavit of William H. Gorham].

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Demand for Copy.

Comes now the defendant by his attorney, J. H. Allen, and demands a copy of the paper writing claimed to be an account stated referred to in paragraph 3, of the amended complaint herein; and he also demands a view and inspection of said paper writing.

JOHN H. ALLEN,
Attorney for Defendant.

Copy of within affidavit received this 20th day of September, 1909.

JOHN H. ALLEN,

Attorney for Defendant.

[Endorsed]: Affidavit of William H. Gorham in Support of Motion for an Order for Inspection and Copy of Paper. Filed U. S. Circuit Court, West-

ern District of Washington. Sep. 21, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Answer to Defendant's Demand for Copy.

Comes now the plaintiff and submits:

First. A copy of the account stated, referred to in the third paragraph of plaintiff's amended complaint and in defendant's demand for copy, heretofore filed herein, together with a copy of the original letter, dated April 29, 1908, addressed to defendant and signed by plaintiff, referring to and enclosing said original statement.

Second. A copy of the original letter of date May 4, 1908, signed by defendant and addressed to plaintiff, and which was received by plaintiff on or about May 8, 1908, in due course of mail.

Third. A copy of letter of May 8, 1908, from plaintiff addressed to defendant, acknowledging receipt of said letter of May 4, 1908.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

STATEMENT.

San Francisco, April 29th, 1908.

M C. H. LILLY & CO.,
Seattle, Washington.

IN ACCOUNT WITH

California Fruit Canners' Association.

Nov.	1.	To Mdse.	W. H. %	6000 00	
	1.	"	"	1200 00	
	1.	"	"	968 75	
	1.	"	"	248 75	
Dec.	5.	To Storage		15 00	
	5.	"		75 00	
	31.	To Mdse.	W. H. %	10699 60	
Jan.	2.	" Storage		87 25	
	2.	" "		18 25	
Apr.	1.	" "		166 39	
	24.	" "		166 39	
					19645 38
Feb.	26.	By Claim Feb. 12		4 28	
	29.	" Mdse. W. H. %		842 17	846 45
					18798 93
Apr.	29.	To Interest Balance to date			386 94
					$19185 87

COPY.

S. L. G. K. N. F.

April 29th, 1908.

C. H. Lilly & Co., Seattle, Wash.

Gentlemen: We enclose herewith statement of your account, and must respectfully insist upon your prompt reply with remittance.

You must concede that we have been more than liberal in letting the account stand so long, and we feel that any fair consideration will insure immediate payment.

We are mindful of the unfortunate market conditions, which doubtless hindered the sale of these goods, but you must realize that these conditions prevailed throughout the country. We had to pocket a heavy loss on goods packed in anticipation of normal trade in the Winter and Spring, and we cannot afford to let this account run longer. We have obligations to meet, and must insist upon our customers meeting their obligations to us.

Asking the favor of an immediate reply with remittance, we remain,

Yours very truly,
CALIFORNIA FRUIT CANNERS ASSN.,
Per (Signed) S. L. GOLDSTEIN,
Treasurer.

COPY.

Seattle, U. S. A., May 4/08.

The Cal. Fruit Canners' Assn.,
San Francisco, Cal.,

Gentlemen: We have your favor of Apr. 29th, and in reply beg to say we will endeavor to send

you a substantial remittance on this account during the ensuing month. We are badly overloaded on canned goods as you undoubtedly know, and have been endeavoring to make some turns on the goods which you are holding in the warehouse for us, but without success to date.

We do appreciate your leniency and expect to do all we can to lighten your burden but will have to ask you to bear with us for the present.

Thanking you in advance, we are,

Yours very truly,

C. H. LILLY & CO.,

Per C. H. LILLY.

F. R. B.

COPY.

CHB KNF

May 8th, 1908.

C. H. Lilly & Co., Seattle, Wash.

Gentlemen: We thank you for your kind favor of the 4th inst, and assure you that we have no desire to work unnecessary hardships.

If you will kindly advise us what we may expect during the coming month in the way of remittance, so that we may make our plans accordingly, we will appreciate it, and thank you for an immediate reply.

Yours very truly,

CALIFORNIA FRUIT CANNERS' ASSN.,

Per (Signed) C. H. BENTLEY,

Manager Sales Dept.

Received a copy of statement of April 29, 1908, of letters of April 29, 1908, May 4, 1908, and May 8,

1908, hereby acknowledged, and an inspection of the original of said letter of May 4, 1908, hereby acknowledged this 27 day of September, 1909.

J. H. ALLEN,
Attorney for Defendant.

[Endorsed]: Answer to Dfdt's Demand for Copy. Filed U. S. Circuit Court, Western District of Washington. Sep. 27, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Motion for Bill of Particulars.

Comes now the plaintiff and moves the Court for an order requiring defendant to furnish plaintiff with a Bill of Particulars showing:

1st. The quantity of each kind and grade of the canned vegetables and fruits of standard, special, extras, and other grades which plaintiff represented to defendant that it had stored in warehouses subject to the order of defendant; and

2d. The value thereof which defendant agreed to pay; all as alleged in the 3d paragraphs of the 1st and 2d defenses and counterclaim in defendant's answer herein;

3d. When and where defendant made said agreement;

4th. Whether or not said agreement was in writing; if in writing, a copy thereof; if not in writing, with what officer or agent of plaintiff (giving his name and title—if either or both are known to defendant) the said agreement was made.

5th. To what extent in quantity, as alleged in the 4th paragraph of said defenses and counterclaim, the plaintiff did not have the goods referred to in the 3d paragraphs of said defenses and counterclaim;

6th. Through what officer or agent of plaintiff (giving his name and title, if either or both are known to defendant) and when and where, did defendant call plaintiff's attention to defendant's discovery that said goods were not of the quality represented by plaintiff, and cause plaintiff to inspect said goods or any portion thereof; and

7th. Through what officer or agent of plaintiff (giving his name and title, if either or both are known to defendant) did plaintiff admit and confess that said goods were not of the quality or grade represented, and agree and undertake to remedy said defects and to reimburse defendant for damage or injury caused thereby;

—all as alleged in the 5th paragraphs of said defense and counterclaim.

This motion is based on the files and records herein and on the affidavit of Charles Harvey Bentley, served herewith.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of within Motion received this 12 day of Oct., 1909.

JOHN H. ALLEN,
Atty. for Deft.

[Endorsed]: Plaintiff's Motion for Bill of Particulars. Filed U. S. Circuit Court, Western District of Washington. Oct. 12, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Motion [for Order Directing Defendant to Give Plaintiff an Inspection of Account, etc.].

Comes now the above-named plaintiff and moves the Court for an order herein directing the above-

named defendant, within a time to be specified by the Court, to give plaintiff an inspection and copy, or permission to make a copy of:

That certain original statement of account, of date San Francisco, April 29, 1908, between the plaintiff and defendant herein, showing a balance due from defendant to plaintiff in the sum of $19,-185.87, made and rendered by plaintiff to defendant, to wit, said date, together with an inspection and copy, or permission to make a copy, of that certain original letter dated April 29, 1908, addressed to defendant and signed by plaintiff, referring to and inclosing said original statement, which said letter was forwarded by plaintiff at San Francisco, California, to defendant, at Seattle, Washington, by United States mail, on or about said date and received by said defendant in the usual course of mail on or about May 4, 1908.

This motion is based on the files and records in this cause and upon the affidavit of William H. Gorham, filed herewith.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Notice.

To Charles H. Lilly, the Above-named Defendant, and to John H. Allen, Esq., his Attorney:

You and each of you will please take notice that the plaintiff will, on the 27th day of September, 1909, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court in the U. S. Courthouse, in the city of Seattle, State of Washington, call up for hearing the motion of plaintiff for an order to give plaintiff an inspection and copy of certain documents in said motion particularly referred to and described, a copy of which said motion is herewith served upon you.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of within Motion and Notice received this 20th day of September, 1909.

JOHN H. ALLEN,
Attorney for Defendant.

[Endorsed]: Notice and Motion for an Order for Inspection and Copy of Papers. Filed U. S. Circuit Court, Western District of Washington. Sep. 21, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Order [Directing Production of Certain Documents].

This cause coming on to be heard on the motion of plaintiff for an order herein for inspection and copy of certain documents and papers, the parties appearing by their respective attorneys;

It appearing to the Court that said writings were last in the possession or power of said defendant and contain evidence pertinent to the issue tendered by plaintiff's amended complaint herein, the Court being fully advised in the premises;

It is ordered that the defendant at the trial of said cause produce;

1st. That certain original statement of account, of date San Francisco, April 29, 1908, between the plaintiff and defendant herein, showing a balance due from defendant to plaintiff in the sum of $19,185.87, made and rendered by plaintiff to defendant on, to wit, said date;

2d. That certain original letter dated April 29, 1908, addressed to defendant and signed by plaintiff, referring to and inclosing said original statement, which said letter was forwarded by plaintiff at San Francisco, California, to defendant, at Seattle, Washington, by United States mail, on or about said last-named date and received by said defendant in the usual course of mail on or about May 4, 1908, or show cause for failure to produce said documents.

Dated September 27, 1909.

C. H. HANFORD,
Judge.

[Endorsed]: Order to Produce Writings on Trial. Filed U. S. Circuit Court, Western District of Washington. Sep. 27, 1909. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Record of Trial—Minutes of Court—January 19, 1910.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHAS. H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

January 19, 1910.

Now, on this 19th day of January, 1910, this cause comes on regularly for trial, in open court, plaintiff being represented by Wm. H. Gorham, Esquire, and defendant represented by J. H. Allen, Esquire, and W. A. Peters, Esquire, a jury being called come and answer to their names as follows: Howard McLeod, Jud Yoho, H. H. Morrison, David Jones, Sam'l C. Watkins, Geo. Talbot, F. O. Pattison, Noble P. Doolittle, Harlan P. Zimmerman, William H. Vernon, William Kohwes, Frank A. Audley, twelve good and lawful men duly impaneled and sworn. The trial proceeds by the introductions of depositions of witnesses on the part of the plaintiff; whereupon plaintiff rests. The defendant moves the Court to strike testimony con-

tained in depositions, which motion is denied. The cause proceeds by the argument of respective counsel upon the motion of defendant for a nonsuit, and the Court having duly considered the motion for nonsuit interposed in this cause, and being sufficiently advised, grants said motion, and the jury are discharged from further consideration of the cause. To the rulings of the Court in granting the nonsuit herein the plaintiff excepts and his exception is allowed.

Record of Trial in United States Circuit Court Journal, Volume 1, page 311.

[Transcript of Oral Opinion on Motion for a Nonsuit.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,

Plaintiff,

vs.

CHARLES H. LILLY, as C. H. LILLY & CO.,

Defendant.

Transcript of Oral Opinion of the Court in Passing on Defendant's Motion for a Nonsuit in the Above-entitled Cause, Given on the Trial Thereof Before Hon. GEORGE DONWORTH, Judge, and a Jury, July 10, 1910.

Mr. PETERS.—Plaintiff having rested, your Honor, the defendant now moves for a nonsuit upon the ground that no obligation has been shown upon which this account stated, as claimed by the plaintiff, may rest—no consideration—no prior transaction shown back of the account stated. Again, that the promise on the part of Lilly to pay the account, as embodied in this Exhibit number 3 to the depositions, this letter of May 4th, was a promise to pay conditioned upon certain goods being in the warehouse to his order. There is no proof that such goods were in the warehouse to Lilly & Company's order; on the contrary, the proof is no such goods were there.

After argument of the motion by Mr. Peters and Mr. Allen for the defendant, and Mr. Gorham for the plaintiff, thereupon

The COURT.—An action brought on an account stated is undoubtedly a proper action to bring, and it is an action that has grown out of the experience of business men, who find that when parties have adjusted their accounts and dismissed matters from their memory, that the balance then ascertained to be due, one way or the other, should thereafter be treated as a definite thing, and they need not take the trouble thereafter to go through again the settlement or adjustment that they have once made.

Now, the law provides that an account of that kind shall have a definite effect and be considered the basis of a new promise, with the proviso that either party may surcharge it or falsify it by showing that it was the result of fraud or a serious mistake.

Now, the question in this case is, and the only question there is before the court, is there sufficient evidence here upon which the jury, if the case were to close right now, could find a verdict for the plaintiff which the Court would permit to stand? I do not think there is.

This account or this statement of account which was sent by plaintiff to defendant is the ordinary method or discloses the ordinary method of stating an account for goods sold and delivered. It says "to merchandise" and then followed by several items of storage. Now, the uncontroverted evidence here shows that no sale of merchandise ever took place. The parties, both parties, probably thought that what was done amounted to a sale—at least the plaintiff thought so. The defendant thought a sale had taken place, and his letter upon which the adjustment of account really is based speaks of the goods being held or carried in warehouse—being "held in warehouse for us."

Now, it is plain under the authorities that the property in these goods never passed to the defendant, consequently no action for goods sold and delivered could be maintained.

Now, could this action be maintained or could the case be submitted to the jury on the theory suggested by the Court a few minutes ago, that the parties may have expressly stipulated that the goods were to remain the property of the plaintiff and were to remain in the general mass of the plaintiff's property until the defendant called for them. Now, that would be an executory contract. I am not clear

whether the principles of an account stated could apply to an executory contract or series of executory contracts.

Assuming that the principles might so apply this would be the result: I do not think that stating the account, that is, striking a balance, would change the nature of the undertaking between the parties. If there were executory contracts the plaintiff could not recover the purchase price without going through the formality, at least, of tendering the goods. It is true the circumstances might be such that a tender would take place by merely segregating the goods from the general mass in the plaintiff's own warehouse, but there would have to be something in the nature of a tender, some endeavor to pass the property to the buyer before an action could be maintained for the purchase price.

So it seems to me that even if the principles of an executory contract apply to an account stated that the plaintiff has not shown a liability. Undoubtedly the plaintiff may maintain an action, if it has contracts, and I assume that it has, and if they have been violated by the defendant the plaintiff may maintain an action for such violation; but on the basis of an account stated it seems to me that the proof has negatived the liability asserted for the reasons that I have already stated.

The motion for a nonsuit will therefore be granted.

Mr. GORHAM.—We desire to have an exception noted, if the Court please.

The COURT.—An exception will be noted for plaintiff.

Transcript of Oral Opinion of the Court in Passing on Defendant's Motion for a Nonsuit in Above-entitled Cause.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Judgment of Dismissal.

This cause coming on for trial on the 19th day of January, 1910, plaintiff appearing by their attorney, Wm. G. Gorham, Esq., the defendant appearing by its attorneys, J. H. Allen, Esq., and W. A. Peters, Esq., and a jury having been impaneled and sworn to try said cause, and the plaintiff having offered its evidence, defendant thereupon moved for a nonsuit and judgment of dismissal, and the Court having heard the arguments of counsel and being fully advised in the premises, it is hereby ordered that the said motion be, and the same hereby is granted. And it is further ordered that the said cause be, and the same hereby is dismissed.

To which ruling of the Court plaintiff excepts and his exception is allowed.

Done in open court this the 27th day of January, 1910.

GEORGE DONWORTH,
Judge.

We hereby acknowledge receipt of a copy and service of the within Judgment, this 21st day of January, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

[Endorsed]: Judgment of Dismissal. Filed U. S. Circuit Court, Western District of Wash. Jan. 27, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,
Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,
Defendant.

Notice [of Application for Taxation of Costs].

To Wm. H. Gorham, Esq., Attorney for Plaintiffs:

You will please take notice that on the 27th day of January, 1910, at the hour of 2 o'clock P. M., application will be made to the Clerk of said Court to have the within Memorandum of Costs and Disbursements taxed pursuant to the rules of the said Court in such cases made and provided.

J. H. ALLEN,
Attorney for Defendant.

Due service of the within and foregoing Memorandum of Costs and Disbursements and notice of taxation thereof by receipt of a true copy thereof is hereby admitted upon behalf of all parties entitled to the same.

January 21, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Memorandum of Costs.

	Amount Claimed	Amount Allowed.
Clerk fees	$10.00	3.80
Marshal fees		
Attorney fees	20.00	20.00
Reporter's fees	5.00	5.00
C. P. Sessions for depositions	13.50	.00
Witness fees:		
F. R. Beckham, 1 day, 2 miles	3.10	3.10
Chas. H. Lilly, 1 day, 2 miles	3.10	.00
W. H. Lilly, 1 day, 2 miles	3.10	3.10
L. K. Rudd, 1 day, 2 miles	3.10	3.10
T. H. Fox, 1 day, 2 miles	3.10	3.10
Arthur Waters, 1 day, 2 miles	3.10	3.10
——— Williamson, 1 day, 2 miles	3.10	——
J. H. Allen, Jr., 1 day, 2 miles	3.10	3.10
Geo. M. Burrington, 1 day, 2 miles	3.10	3.10
——— Tunstad, 1 day, 2 miles	3.10	3.10
	$79.50	$53.60

Taxed January 27, 1910.

A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

State of Washington,
County of King,—ss.

J. H. Allen, being first duly sworn, on oath states that he is one of the attorneys for the defendant

herein, that the foregoing items were necessarily expenditures incurred by the defendant in the above-entitled cause and that the items in said memorandums are correct to the best of affiant's knowledge and belief.

J. H. ALLEN.

Subscribed and sworn to before me this the 21st day of January, 1910.

WALTER B. ALLEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

We hereby acknowledge receipt of a copy and service of the within C/Bill this 21st day of January, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

[Endorsed]: Cost Bill. Filed U. S. Circuit Court, Western District of Washington. Jan. 27, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Petition for New Trial.

Comes now the plaintiff and moves the Court for a new trial in the above-entitled cause, for the following causes materially affecting the substantial rights of plaintiff, to wit:

1. Error in law occurring at the trial, in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. Does it or does it not mean that you have claimed to have that much merchandise or storage in your warehouse at that date belonging to C. H. Lilly & Company?

(Page 9, Line 20 of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

2. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Q. Then is that the case with each item of merchandise on that statement?

(Page 9, Line 28, Page 10, Line 1, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

3. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following

question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Q. Then your statement that the goods did not belong to Lilly & Company, but were stored until paid for by them, is that or is that not correct?

(Page 10, Line 11, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

4. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness, to the following question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Q. None of the merchandise items, then, on this statement is the property of Lilly & Company?

(Page 10, Line 17, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

5. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness, to the following questions propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Stored how, as security for the payments—for the account?

(Page 10, Line 24, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

6. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question, propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Or as Lilly & Company's property?

(Page 10, Line 27, Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

7. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, and that it does not appear the witness is qualified to answer the question, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Where were the goods stored?

(Page 11, Line 3, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

8. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Kindly state which warehouse?

(Page 11, Line 11, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

9. Error in law occurring at the trial in this:

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Kindly state in which warehouse and the location thereof.

(Page 11, Line 16, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

10. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Read the question.

Mr. ALLEN.—Answer the question.

(Page 11, Lines 22 and 26, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

11. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Q. How do you know whether they are stored at all anywhere?

(Page 12, Line 25, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

12. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following

question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Does your book show in what warehouse these particular goods you have been testifying about are stored?

(Page 13, Line 5, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

13. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Does the statement on the books with which you have compared this statement, as you have testified to hitherto, show where these goods are stored?

(Page 13, Line 11, of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

14. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Kindly state the names, number and place of your various warehouses?

(Page 13, Line 17, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

15. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection,

as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Q. Kindly give us the location of the two warehouses in San Francisco?

(Page 14, Line 3, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

16. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Q. Have you ever seen these goods in person?

(Page 14, Line 14, of Depositions of Goldstein et al.)

—to which the plaintiff excepted.

17. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Q. Well, have you?

(Page 14, Line 20, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

18. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Then I understand you, you are testifying to the last question as to your custom?

(Page 15, Line 6, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

19. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Q. And so far as you know, the usual custom that you just testified to was followed in the case at bar?

(Page 15, Line 10, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

20. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Q. Then you are—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement, Plaintiff's Exhibit No. 2, the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?

(Page 15, Line 14, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

21. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness, S. L. Goldstein, on cross-examination:

Q. In answering this last question, you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2, were the goods of the California Fruit Canners' Association, and stored with all their other goods?

(Page 15, Line 27, Page 16, Line ½ of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

22. Error in law occurring at the trial in this: The Court erred in granting the motion of defendant for a nonsuit, to which ruling of the Court the plaintiff excepted.

This petition is based upon the pleadings and papers on file in said cause and upon the depositions of S. L. Goldstein, W. F. McMillin and C. H. Bentley, filed and read as evidence in said cause, and upon the minutes of the Court in this cause.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of within petition received this 7th day of March, 1910.

JOHN H. ALLEN,
Attorney for Defendant.

[Endorsed]: Petition for New Trial. Filed U. S. Circuit Court, Western District of Washington. Mar. 8, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Order [Denying Petition for New Trial].

This cause having heretofore come on regularly to be heard upon a petition of the plaintiff for a new trial herein, the Court having heard the argument of counsel and being sufficiently advised in the premises, it is ordered and adjudged that the said petition for a new trial be, and the same is hereby denied.

To which ruling the plaintiff excepts and its exceptions are allowed.

Done in open court this the 19th day of March, 1910.

GEORGE DONWORTH,

Judge.

O. K. as to form.

WILLIAM H. GORHAM.

We hereby acknowledge receipt of a copy and service of the within order this 21st day of March, 1910.

_____,

Attorney for Plaintiff.

[Endorsed]: Order. Filed U. S. Circuit Court, Western District of Washington. Mar. 19, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,

vs.

CHARLES H. LILLY.

Order [Extending Time to Prepare, etc., Proposed Bill of Exceptions].

Upon motion of plaintiff and with consent of defendant,—

It is ordered that the time within which plaintiff may prepare, serve and file its draft of its proposed bill of exceptions, in the above-entitled cause, be, and the same is hereby extended to March 18, 1910.

Dated February 18, 1910.

GEORGE DONWORTH,
Judge.

O. K.—JOHN H. ALLEN.

[Endorsed]: Order. Filed U. S. Circuit Court, Western District of Washington. Feb. 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Bill of Exceptions.

Be it remembered, that on the 19th day of January, 1910, on the trial of this cause in this court, at the November Term 1909 of said court, the Honorable George Donworth, United States District Judge presiding, William H. Gorham, attorney for plaintiff, and J. H. Allen, Esq., and W. A. Peters, Esq., attorneys for defendant, being present, when the following proceedings were had, to wit:

A jury was impaneled and sworn according to law and thereupon the following proceedings were had:

To sustain the issues upon its part the plaintiff offered in evidence a paper in words, letters and figures following, to wit:

[Plaintiff's Exhibit No. 5.]

State of California, Department of State.

Whereas, it appears that a certificate of incorporation was issued to the California Fruit Canners'

Association under my hand and the Great Seal of State of the State of California at my office in Sacramento, California, on the 3d day of July, A. D. 1899, and

Whereas, it appears by affidavit that said certificate was destroyed by conflagration in the City and County of San Francisco, State of California, on the 18th day of April, 1906,

Now, Therefore, I, C. F. Curry, Secretary of State of the State of California, do hereby certify that a copy of the articles of incorporation of the California Fruit Canners' Association certified by the County Clerk of the City and County of San Francisco as a copy of such articles filed in his office was filed in this office on the 3d day of July, A. D. 1899, which articles and the copy thereof contained the required statement of facts, to wit:

First. The name of the corporation as aforesaid.

Second. The purpose for which it was formed.

Third. The place where its principal business is to be transacted.

Fourth. The term for which it is to exist.

Fifth. The number of its directors or trustees and the names and residences of those who are appointed for the first year.

Sixth. The amount of its capital stock and the number of shares into which it is divided.

Seventh. The amount of its capital stock actually subscribed and by whom.

Witness my hand and the Great Seal of State at office in Sacramento, California, this 13th day of December A. D. 1909.

C. F. CURRY,
Secretary of State.
By J. J. SMITH.

(Great Seal of the State of California.)

—to the admission of which defendant objected on the ground of incompetency.

Which objection was overruled by the Court, to which ruling defendant excepted, and said paper was received and introduced in evidence and marked Plaintiff's Exhibit 5.

Thereupon the plaintiff demanded that the defendant produce now at said trial, pursuant to the order of said court theretofore on September 27th, 1909, entered in said cause:

1st. That certain original statement of account, of date San Francisco, April 29th, 1908, between the plaintiff and defendant herein, showing a balance due from defendant to plaintiff in the sum of $19,185.87 made and rendered by plaintiff to defendant on, to wit, said date;

2d. That certain original letter dated April 29th, 1908, addressed to defendant and signed by plaintiff referring to and enclosing said original statement, which said letter was forwarded by plaintiff at San Francisco, California, to defendant at Seattle, Washington, by United States mail on or about said last named date and received by said defendant in the usual course of mail on or about May 4th, 1908.

In response to which demand counsel for defendant stated in open court in the presence of the jury, that defendant had searched for both said statement and said letter, and could not find either of them, and therefore defendant was unable to comply with plaintiff's demand.

Thereupon the plaintiff filed in said cause an original summons issued by the Clerk of said court to the United States Marshal of said District, for the attendance upon said court of S. L. Goldstein, W. F. McMillin and C. H. Bentley as witnesses on behalf of the plaintiff in said cause, at the trial thereof on said 19th day of January, 1910, at the hour of ten o'clock A. M., together with the return of said Marshal endorsed thereon that said witnesses could not be found in said District.

Thereupon, to further sustain the issues on the part of plaintiff, the depositions de bene esse of S. L. Goldstein, W. F. McMillin and C. H. Bentley, witnesses on behalf of the plaintiff, theretofore duly taken and, with the original notice of the taking of the same with acknowledgment of due service thereof on defendant, endorsed thereon by defendant, returned and filed in said cause and by order of Court theretofore duly entered, published, were on behalf of plaintiff read in evidence and the exhibits thereto attached and made a part thereof and returned therewith offered in evidence as follows:

Deposition of S. L. Goldstein, called for the Plaintiff.

Mr. GORHAM.—Q. State your full name, Mr. Goldstein.

A. Sanford L. Goldstein.

Q. Your age? A. Forty-five.

Q. And your residence?

A. 1998 Jackson street.

Q. What city and state?

A. San Francisco, California.

Q. How long have you resided in California?

A. Forty-five years.

Q. Do you expect to live in the State of California within the next eight months?

A. Yes, sir.

Q. You have no expectancy of changing your residence and coming to live within the western district of Washington, northern division, within the next eight months? A. No, sir.

Q. Do you know the plaintiff association in this cause, the California Fruit Canners' Association?

A. Yes, sir.

Q. Are you an officer of that association?

A. Yes, sir.

Q. What officer?

A. Vice-president and treasurer.

Q. How long have you been such officer, approximately? A. Ten years.

Q. I will ask you, Mr. Goldstein, what are your duties as treasurer, if any, with reference to the forwarding of statements of account to customers?

(Deposition of S. L. Goldstein.)

A. Any large overdue statements are sent me and I usually forward them and write a letter at the same time.

Q. Where do you get those statements of account from?

A. I usually get them from the secretary's office.

Q. What was the custom in 1908 of your association as to statements being enclosed in letters for transmission?

Mr. ALLEN.—Object to the question as incompetent, irrelevant and immaterial.

Objection overruled by the Court.

A. The statements are sent to me, I write a letter and send the statement with the letter to the party addressed.

Mr. GORHAM.—Q. State whether or not there is a custom, or was in 1908, upon the part of the association as to keeping carbon copies of such correspondence?

Mr. ALLEN.—Objected to as irrelevant, incompetent and immaterial.

Objection overruled by the Court.

Mr. GORHAM.—Q. State whether there was a custom.

Mr. ALLEN.—Object on the same grounds.

Objection overruled by the Court.

A. There was a custom of keeping carbon copies of statements.

Mr. GORHAM.—Q. I am referring to correspondence.

(Deposition of S. L. Goldstein.)

A. Also kept a carbon of each letter that was sent out.

Q. I hand you a paper which is marked Plaintiff's Exhibit for Identification No. 1, and ask you what is that paper?

A. This is a letter addressed to C. H. Lilly & Company, signed by me.

Q. Is that letter signed by you?

A. Yes, sir, the original.

Q. What is this?

A. This is a carbon copy of the original letter I sent to Lilly & Company.

Q. Was the original sent? A. Yes, sir.

Q. By whom? A. By me as treasurer.

Q. What was your authority as treasurer to sign correspondence of that nature?

A. I was authorized by the board of directors of the California Fruit Canners Association.

Mr. ALLEN.—Move to strike out the answer.

Objection overruled by the Court.

Mr. GORHAM.—Q. What was done with the original of which that is a carbon copy, after you had signed it?

A. It was sent to Lilly & Company.

Q. What Lilly & Company are you referring to?

A. Lilly & Company of Seattle, Washington.

Q. The defendant in this suit?

A. Yes, sir.

Mr. ALLEN.—Objection.

Objection overruled by the Court.

(Deposition of S. L. Goldstein.)

Mr. GORHAM.—I will withdraw the question.

Q. Please state specifically what Lilly & Company it was sent to?

A. It was sent to Lilly & Company of Seattle, Washington.

Q. Are there any initials to that firm?

A. C. H. Lilly & Company.

Q. State whether or not the statement referred to in this plaintiff's Exhibit for Identification No. 1 was forwarded with the original letter?

A. Yes, sir.

Q. I will ask you whether or not this paper marked Plaintiff's Exhibit for Identification No. 1 is part of the files of the plaintiff association?

A. What was the question?

(Last question read.)

A. Yes, sir.

Q. What was the custom of the plaintiff in 1908 relative to retaining carbon copies of statements sent out?

Mr. ALLEN.—Objected to as incompetent, irrelevant and immaterial.

Objection overruled by the Court.

A. We invariably keep the carbon copies of the statements on file.

Mr. GORHAM.—We offer Plaintiff's Exhibit for Identification No. 1 in evidence.

Mr. ALLEN.—I object on the ground the proper foundation has not been laid.

Objection overruled by the Court.

(Deposition of S. L. Goldstein.)

Mr. GORHAM.—Q. I hand you paper which I will ask the Notary to mark Plaintiff's Exhibit for Identification No. 2 and ask you what that is?

A. That is a carbon copy of the original statement sent to C. H. Lilly & Company, Seattle, Washington.

Q. What date? A. April 29th, 1908.

Q. Corresponding date to Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. The letter just referred to?

A. Yes, sir.

Q. As treasurer what is your knowledge of payments made by customers on account?

A. The payments are sent to me—to my office, and I forward them to the cashier's department.

Q. State whether or not since sending the letter, of which Exhibit No. 1 is a copy, with statement included—since the sending of that has there been any payment made upon that account?

A. No, sir.

Q. I call your attention to item of April 29th on Plaintiff's Exhibit for Identification No. 2, 166.39, to refresh your memory—storage, April 24th, 166.-39? A. It is not paid.

Q. The preceding item of April 1st, 166.39.

A. It was not paid, either.

Mr. GORHAM.—I would like to have that date changed to 24th instead of 29th. That is all.

(Deposition of S. L. Goldstein.)

Cross-examination.

(Read and offered in evidence at the conclusion of the cross-examination of the witness W. F. McMillin.)

Mr. ALLEN.—Q. Mr. Goldstein, you say during the year 1907, 1906, you were vice-president and treasurer of the plaintiff? A. Yes, sir.

Q. You say that Plaintiff's Exhibit No. 1 was sent to C. H. Lilly & Company? A. Yes, sir.

Q. How do you know?

A. How do I know? I mailed it there.

Q. You mailed it yourself? A. I did not.

Q. You say this is a carbon copy of the letter referred to that you signed and say was sent there?

A. Yes, sir.

Q. Did you make the copy? A. I did not.

Q. Did you compare the copy?

A. I did not.

Q. How do you know it is a carbon copy?

A. It must be a carbon copy.

Q. You are swearing to what you believe to be true? A. Yes, sir.

Q. Do you know of your personal knowledge whether it is a copy or whether it has been sent?

A. It is customary to take carbon copies of letters and the original is sent to the mailing clerk, and our letters are always forwarded, and very seldom we hear of a letter being miscarried, if there are they come back.

Mr. GORHAM.—I move to strike the answer out as irresponsive.

(Deposition of S. L. Goldstein.)

Mr. ALLEN.—I will repeat the question: Q. Then you don't know that this is a carbon copy or that it was sent to C. H. Lilly & Company?

A. It must be.

Q. Answer my question.

Mr. GORHAM.—I object to counsel bawling out the witness.

Mr. ALLEN.—Let him answer my question yes or no.

Q. Answer yes or no, if you please?

A. No.

Q. Referring to Plaintiff's Exhibit for Identification No. 2, I will ask you who made out that statement? A. The credit department.

Q. You identify this as a copy of the paper, the statement referred to in Plaintiff's Exhibit No. 17?

A. Yes.

Q. How do you identify it?

A. Because I know it is the same account.

Q. The same balance you mean?

A. The same account.

Q. Is that all, the only reason you know?

A. I know it is the same date, and I know it is the same account; it agrees with our books.

Q. You compared it with your books?

A. Yes, sir.

Q. Where are your books?

A. Here in the city.

Q. Will you kindly produce the books containing this account?

A. Will I produce them—if necessary we can.

(Deposition of S. L. Goldstein.)

Q. Do you require me to give notice in writing?

Mr. GORHAM.—This isn't a suit on any statement shown by the books.

Mr. ALLEN.—That is all right; I want to know if you require me to give notice in writing for the books in which this account is stated?

Mr. GORHAM.—I think we will.

Mr. ALLEN.—Very well, we will conform to that command.

Q. Now, has this statement been in your possession ever since—in the company's possession?

A. Yes.

Q. You swear positively that no item on this statement has been paid? A. No, sir.

Q. That is just as true as any statement you have made, is it? A. What do you mean?

Q. That is just as true, I say, your statement that no item on this account has been paid is just as true as any statement you made? A. Yes.

Q. You would be surprised if I showed you a receipt for April, wouldn't you?

A. Paid prior to this time or after this date?

Q. I am asking you?

A. I don't think anything was paid on this statement.

Q. Don't you know as a matter of fact that April and May storage has been paid and you received checks for it? A. Not to my knowledge.

Q. You say the May storage has not been paid?

A. Not to my knowledge.

(Deposition of S. L. Goldstein.)

Q. Your information is just as accurate on those two propositions, on April and May storage, as anything you have been testifying to?

A. Yes, sir.

Q. I see on this statement, to Merchandise—M-d-s-e W. H. account, what does that mean?

A. That is warehouse account.

Q. Warehouse account, that is all it means?

A. Merchandise, warehouse account, yes, sir.

Q. Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?

Mr. GORHAM.—We object as not proper cross-examination.

Which objection was overruled by the Court.

First Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. Those goods belong to the California Fruit Canners Association and are stored in the warehouse until payments are made by Lilly & Company.

Mr. ALLEN.—Q. Then—is that the case with each item of merchandise on that statement?

Mr. GORHAM.—Same objection, not proper examination.

Which objection was overruled by the Court.

Second Exception.

To which said ruling of the Court plaintiff then and there excepted.

(Deposition of S. L. Goldstein.)

A. You are speaking of the warehouse goods?

Mr. ALLEN.—Yes, sir.

A. These goods were charged to Lilly & Company and are held for payment.

Q. If you understand the question, answer it?

A. I think I did understand the first; I answered the second question which pertains to the first question also.

Q. Then your statement that the goods did not belong to Lilly & Company but were stored until paid for by them, is that or is that not correct?

Mr. GORHAM.—We object as not proper cross-examination.

Which objection was overruled by the Court.

Third Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. I said the goods were charged to Lilly & Company and they are not their property until they are paid for.

Mr. ALLEN.—Q. None of the merchandise items, then, on this statement, is the property of Lilly & Company?

Mr. GORHAM.—Same objection; also object as calling for a conclusion of the witness.

Which objection was overruled by the Court.

Fourth Exception.

To which said ruling of the Court plaintiff then and there excepted.

(Deposition of S. L. Goldstein.)

Mr. ALLEN.—Q. Is that what I am to understand?

A. As I said before, they are stored for Lilly & Company until payments are made.

Q. Stored how, as security for the payments—for the account?

Mr. GORHAM.—Same objection.

Which objection was overruled by the Court.

Fifth Exception.

To which said ruling of the Court plaintiff then and there excepted.

Mr. ALLEN.—Q. Or as Lilly and Company's property?

Mr. GORHAM.—Same objection, not proper cross-examination. Which objection was overruled by the Court.

Sixth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. Stored for account of Lilly & Company until they are paid.

Mr. ALLEN.—Q. Where were the goods stored?

Mr. GORHAM.—Same objection, not proper cross-examination, and it does not appear the witness is qualified to answer the question.

Which objection was overruled by the Court.

Seventh Exception.

To which said ruling of the Court plaintiff then and there excepted.

(Deposition of S. L. Goldstein.)

Mr. ALLEN.—I object to the attorney intimating to the witness how he can avoid answering the question.

Mr. GORHAM.—Note your objection.

A. They are stored in one or more of our warehouses.

Mr. ALLEN.—Q. Kindly state which warehouse.

Mr. GORHAM.—Same objection, not proper cross-examination.

Which objection was overruled by the Court.

Eighth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. I stated in one or more of our warehouses; we have a number of them.

Mr. ALLEN.—Q. Kindly state in which warehouse and the location thereof?

Mr. GORHAM.—Same objection.

Which objection was overruled by the Court.

Ninth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. I told you in one or more of our warehouses; we have a number of warehouses distributed throughout the State of California.

Mr. ALLEN.—Read the question.

(Last question read.)

Mr. GORHAM.—Same objection.

Which objection was overruled by the Court.

(Deposition of S. L. Goldstein.)

Tenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. We have a number of warehouses—

Mr. ALLEN.—Q. Answer the question.

Mr. GORHAM.—We object to counsel's manner of addressing the witness—

Mr. ALLEN.—Now, you are not going to do all the talking; when you get through objecting, why then I will talk.

Mr. GORHAM.—I will ask the notary to inform the witness that if he knows where they are stored he may testify as to his knowledge, and if he doesn't know where they are, testify as to his lack of knowledge as to the number of warehouses.

Mr. ALLEN.—Attorney for defendant at this point protests that this witness is an intelligent gentleman supposed to be testifying only to what he knows and he does not need to be led by his attorney.

Mr. GORHAM.—We object still to the question as not proper cross-examination.

Which objection was overruled by the Court.

Eleventh Exception.

To which said ruling of the Court plaintiff then and there excepted.

Mr. ALLEN.—Q. Now, I suppose you will testify in which warehouse?

Mr. GORHAM.—Please have the remarks of attorney for defendant put in the record.

(Deposition of S. L. Goldstein.)

Mr. ALLEN.—And every word you say, down, too.

The NOTARY (Mr. SESSIONS).—Mr. Goldstein, if you know the warehouse in which these goods were stored, please state, and if you do not, please state that you do not.

A. I don't know which particular warehouse.

Mr. ALLEN.—Q. How do you know whether they are stored at all anywhere?

Mr. GORHAM.—Same objection, not proper cross-examination.

Which objection was overruled by the Court.

Twelfth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. We reserve a certain amount—when goods are billed up to a customer they are reserved and stored at one or more of our warehouses, and I know that our books are kept correctly and that goods are withheld for customers to whom they may be charged.

Mr. ALLEN.—Q. Does your book show in what warehouse these particular goods you have been testifying about are stored?

Mr. GORHAM.—We object as not proper cross-examination.

Which objection was overruled by the Court.

Thirteenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

(Deposition of S. L. Goldstein.)

A. That I can't tell.

Mr. ALLEN.—Q. Does the statement on the books with which you compared this statement as you have testified to hitherto, show where these goods are stored?

Mr. GORHAM.—Same objection, as not proper cross-examination.

Which objection was overruled by the Court.

Fourteenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. That I can't tell.

Mr. ALLEN.—Kindly state the names, number and place of your various warehouses?

Mr. GORHAM.—Same objection, as not proper cross-examination.

Which objection was overruled by the Court.

Fifteenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. We have two warehouses here.

Mr. GORHAM.—Q. What do you mean by here?

A. San Francisco—shall I state all the warehouses we have?

Mr. GORHAM.—That is the question.

A. One in Oakland, one in San Leandro, one in Healdsburg, one in Santa Rosa, one in Stockton, one in Sacramento, one in Visalia, one in Fresno, one in Hanford, one in Los Angeles, Marysville, Chico—that is all I can remember.

(Deposition of S. L. Goldstein.)

Mr. ALLEN.—Q. Kindly give us the location of the two warehouses in San Francisco.

Mr. GORHAM.—Same objection, not proper cross-examination.

Which objection was overruled by the Court.

Sixteenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. One is Francisco and Taylor, the other North Point street.

Mr. ALLEN.—Q. Can't you give us the numbers of the warehouses? A. No, I cannot.

Q. Have you ever seen these goods in person?

Mr. GORHAM.—Same objection, not proper cross-examination.

Which objection was overruled by the Court.

Seventeenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. These goods are stored in our warehouse.

Mr. ALLEN.—Q. Answer the question: Have you ever seen these goods in person?

A. Might have.

Q. Well, have you?

A. I might have seen them.

Mr. GORHAM.—Same objection.

Which objection was overruled by the Court.

Eighteenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

(Deposition of S. L. Goldstein.)

Mr. ALLEN.—Q. Now, Mr. Goldstein, you know whether you have seen them?

A. I am trying to answer your question: you say, "Have you or haven't you?"—I have to explain if you want me to answer; I answered it before, if I can explain the question I can answer it.

Mr. GORHAM.—I desire to have the Notary advise the witness that he is entitled to explain his answer.

The NOTARY (Mr. SESSIONS).—Explain your answer.

A. Our goods are stacked in large stacks in our warehouse, stacked up, there are a good many thousand cans, and as orders come in they are labeled, cased and shipped, and in the meantime they are in stacks.

Mr. ALLEN.—Then, as I understand you, you are testifying to the last question as to your custom?

Mr. GORHAM.—Same objection.

Which objection was overruled by the Court.

Nineteenth Exception.

To which said ruling of the Court plaintiff then and there excepted.

Mr. ALLEN.—Q. Is that correct?

A. Yes, sir.

Q. And so far as you know, the usual custom that you just testified to was followed in the case at bar?

Mr. GORHAM.—Same objection.

Which objection was overruled by the Court.

(Deposition of S. L. Goldstein.)

Twentieth Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. It is followed in every case.

Mr. ALLEN.—Q. Then are you—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement, Plaintiff's Exhibit No. 2, the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?

Mr. GORHAM.—Same objection, not proper cross-examination.

Which objection was overruled by the Court.

Twenty-first Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. As I stated before they are stored in stacks.

Mr. ALLEN.—Repeat the question.

(Last question read.)

A. I answered the question; all the goods are stored in the stacks until ordered out.

Q. In answering this last question you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of the California Fruit Canners Association and stored with all their other goods?

Mr. GORHAM.—Same objection, not proper cross-examination.

Which objection was overruled by the Court.

(Deposition of S. L. Goldstein.)

Twenty-second Exception.

To which said ruling of the Court plaintiff then and there excepted.

A. The property of the California Fruit Canners Association and is stored in stacks with other goods.

Mr. ALLEN.—That will do; no further questions.

Mr. GORHAM.—Now, of course this will have to be adjourned from day to day until the transcript is written and the witnesses are recalled and read the testimony.

Mr. ALLEN.—Unless stipulated to the contrary.

Mr. GORHAM.—Yes. I call Mr. W. *L.* McMillin.

Deposition of W. F. McMillin, Called for the Plaintiff.

Mr. GORHAM.—Q. State your full name.

A. William F. McMillin.

Q. Your age? A. Thirty.

Q. Your residence?

A. Hotel Blenheim.

Q. City and State?

A. San Francisco, California.

Q. How long have you lived in San Francisco?

A. Since January 1st, 1907.

Q. Have you any expectancy of changing your residence in the next eight months?

A. No, sir.

Q. Have you any expectancy of living within the Western District, in the Northern Division, of Washington, within the next eight months?

(Deposition of W. F. McMillin.)

A. No, sir.

Q. You know the California Fruit Canners Association, the plaintiff in this case?

A. Yes, sir.

Q. What is your relation with it?

A. I am connected with the credit department of that office.

Q. How long have you been connected with that department? A. Since January 1st, 1907.

Q. State whether or not there was any custom on the part of the association in 1908 relative to obtaining statements of account rendered customers?

Mr. ALLEN.—We object to any custom; we insist upon the statement of testimony being confined to what was done in this particular case. Hold on a minute.

Mr. GORHAM.—We insist upon counsel for defendant speaking respectfully to witnesses upon the stand, and not bawling them out and telling them to hold on a minute.

Mr. ALLEN.—I want to get an objection in there.

Mr. GORHAM.—You should do it courteously.

Mr. ALLEN.—Don't teach your grandfather.

Mr. GORHAM.—You need teaching.

Mr. ALLEN.—You can't do it.

Mr. GORHAM.—Now, will you read the question?

(Last question read.)

A. There was a custom.

Q. What was the custom?

Mr. ALLEN.—Objection.

Objection overruled by the Court.

(Deposition of W. F. McMillin.)

Mr. GORHAM.—Evidently the lesson was well learned.

Mr. ALLEN.—Enter my objection to testimony as to any question that is not binding upon this defendant, but that the testimony must relate to what was done in this particular case as to the second question.

(Last question read.)

A. The custom was to keep a carbon copy of all statements sent out.

Mr. ALLEN.—Move to strike the answer out.

Motion denied by the Court.

Mr. GORHAM.—I show you a paper marked Plaintiff's Exhibit No. 2 for Identification and ask you what is that paper?

A. That is a carbon copy of a statement which we made to C. H. Lilly & Company in April, the 29th, 1908.

Q. Is that a part of the files of the plaintiff association? A. It is.

The NOTARY (Mr. SESSIONS).—Gentlemen, if you will pardon me, I don't think Mr. McMillin was sworn.

Mr. GORHAM.—Let him be sworn and we will ask the questions all over again.

(W. F. McMILLIN, sworn.)

Mr. ALLEN.—If agreeable, this swearing may precede the question.

Mr. GORHAM.—Yes, sir. I will ask you, out of an abundance of caution, at this time, whether all of answers to interrogatories propounded to you at

(Deposition of W. F. McMillin.)

this hearing have been true to the best of your knowledge and belief? A. Yes, sir.

Q. When did you first see that paper, Plaintiff's Exhibit for Identification No. 2, if you remember?

A. When it was passed to me by my stenographer accompanied by the original.

Q. When was that with respect to its date?

A. On April 29th, 1908.

Q. At that time did you—I will ask you was that statement passed to you with the pencil memorandum at the bottom? A. No, sir.

Q. Whose handwriting is the pencil memorandum—at the bottom of the statement?

A. The memorandums in black pencil are my memorandums.

Q. Memorandum "To C.H.B. 4/29 Mailed 4/29" and in a circle "Copy to C.B.C. 3/29/9"—those are the pencil memoranda you refer to as the pencil memorandums? A. Yes, sir.

Q. When were those memoranda made?

A. On the day covered by the memoranda.

Q. When was the memoranda "To C.H.B. 4/29" made? A. April 29th, 1908.

Q. When was the memorandum "Mailed 4/29" made? A. April 29th, 1908.

Q. And "Copy to C.B.C.3/29/9"?

A. March 29, 1909.

Q. What does the first memorandum signify—"To C.H.B., 4/29"?

A. Signifies that I have passed the original copy of this statement to Mr. C. H. Bentley.

(Deposition of W. F. McMillin.)

Q. What does the second memorandum, "Mailed 4/29," signify?

A. It signifies that I have followed up this and have gone to the files to find that there has been a letter written, to see that there has been a statement sent out.

Q. And the third memorandum encircled "Copy to C. B. C. 3/29/9," what does that signify?

A. Signifies that there has been a copy made from this carbon copy.

Q. Were you following the usual custom of your duties with the association in making those memorandums at the time you first made them?

Mr. ALLEN.—We object to the question of custom.

Objection overruled by the Court.

A. It is customary to make a pencil notation of any transactions in connection with any account so that we can see exactly what we have done at all times.

Mr. GORHAM.—We offer Plaintiff's Exhibit No. 2 for Identification in evidence as Plaintiff's Exhibit No. 2.

Mr. ALLEN.—We object to it as incompetent, irrelevant and immaterial.

Objection overruled by the Court.

Mr. GORHAM.—That is all.

Cross-examination.

Mr. ALLEN.—Q. Mr. McMillin, you say you are connected with the credit department of the California Fruit Canners' Association?

(Deposition of W. F. McMillin.)

A. Yes, sir.

Q. Were at that time?

A. At what time?

Q. The time that this transaction took place.

A. Can't you give me some specific date—I have been connected with the credit department since January 1st, 1907.

Q. And you were at the time the transaction to which you have been testifying took place, is that correct?

Mr. GORHAM.—Now, if the witness doesn't understand the time referred to by counsel we would like to have the notary inform the witness that he may ask as to the specific time; what time are you referring to?

Mr. ALLEN.—At the time of the happening of the incidents about which he has been testifying.

Mr. GORHAM.—If you mean those dates—

Mr. ALLEN.—I couldn't mean anything else, Mr. Gorham.

Mr. GORHAM.—Do you understand the question now, Mr. Witness?

A. Yes, I understand it; I have been connected with the department at the times which I have testified about.

Mr. ALLEN.—At that time did you have charge of and conduct yourself the incidents to which you have been testifying? A. I did.

Q. When you made the entry "To C. H. B. 4/29" you say that meant this paper was passed to Mr. Bentley?

(Deposition of W. F. McMillin.)

A. No, sir, it meant that the original of this statement was passed to Mr. Bentley.

Q. Did you pass it to him yourself?

A. I did.

Q. In your hand? A. I did.

Q. When you say in your pencil memorandum "Mailed 4/29" did you mail it yourself?

A. No, sir.

Q. But you made the memorandum yourself?

A. Yes, sir.

Q. You made the memoranda then from what somebody told you? A. No, sir.

Q. On what information did you make that entry?

A. From information gathered from the copy of Mr. Goldstein's letter which I saw myself.

Q. You didn't see it mailed? A. No, sir.

Q. Did you make the carbon copies of these papers yourself?

A. My stenographer made them.

Q. In your presence? A. Yes, sir.

Q. You saw it done? A. Yes, sir.

Q. And it was done at the time, to wit, April 29th, 1908? A. It was.

Mr. ALLEN.—That is all.

Redirect Examination.

Mr. GORHAM.—Q. You say that in making the memo. on Exhibit No. 2, mailed 4/29, you looked up the files to see whether or not there was a copy of the letter of transmission of the original statement of which this statement is a copy?

(Deposition of W. F. McMillin.)

A. Yes, sir.

Q. Did you see at that time Plaintiff's Exhibit No. 1? A. I did.

Q. Among the files of the association?

A. I found the copy in the files.

Q. And it was on the strength of finding this among the files, Exhibit No. 1, that you made the pencil memorandum on Plaintiff's Exhibit No. 2?

A. Yes, sir.

Mr. GORHAM.—That is all.

Mr. ALLEN.—That is all.

Deposition of C. H. Bentley, Called for the Plaintiff.

Mr. GORHAM.—Q. What is your full name?

A. Charles Harvey Bentley.

Q. Your age? A. Forty years.

Q. Residence?

A. San Francisco, California.

Q. How long have you lived in San Francisco?

A. Approximately ten years.

Q. Do you expect to change your residence within the next eight months? A. I do not.

Q. Do you expect to come to live in the Western District of Washington, Northern Division, within the next eight months?

A. I do not.

Q. Are you associated with the plaintiff association, the California Fruit Canners' Association?

A. I am.

Q. In what capacity?

A. Manager of sales department.

(Deposition of C. H. Bentley.)

Q. State whether or not you have charge of carrying on any of the correspondence of the association respecting that department?

A. I do.

Q. Is correspondence addressed to the association and received by the association concerning matters affecting your department, referred to you?

A. Immediately, yes, sir.

Q. I show you a paper which I ask to have marked Plaintiff's Exhibit for Identification No. 3, and I ask you when you first saw that paper, if you remember?

A. It was received in our office on the afternoon of May 7th.

Q. What year?

A. 1908, to the best of my recollection it was given to me that afternoon, that would be the ordinary custom, and I find my initials on that letter indicating that I had received it.

Q. Your initials in pencil? A. Yes, sir.

Q. Is that letter in the same condition as when received, excluding the rubber stamp marks, the pencil initialing C.H.B. and the name McMillin?

A. In so far as it relates to the reading matter, yes.

Q. Was that letter, so far as you know, received in due course of mail by the association?

A. Yes, sir.

Q. Do you know this signature subscribed to the letter?

(Deposition of C. H. Bentley.)

A. I would not consider myself competent to pass on Mr. Lilly's signature, no.

Mr. GORHAM.—We offer the letter in evidence that it may go forward with the deposition subject to our right to produce further testimony as to the signature subscribed to the letter, Plaintiff's Exhibit No. 3.

Mr. ALLEN.—Same objection, the proper foundation has not been laid.

Objection overruled by the Court.

Q. Was there any custom in 1908 on the part of the association as to retaining copies of correspondence from your department?

Mr. ALLEN.—We object to any testimony as to custom.

Objection overruled by the Court.

A. It was our custom, to retain carbon copies.

Mr. GORHAM.—Q. Was it at that time?

A. Yes, sir.

Q. I show you paper which I ask to have marked Plaintiff's Exhibit for Identification No. 4, and ask you what that is?

A. This is a carbon copy of the letter which I dictated and which was sent to C. H. Lilly & Company of Seattle acknowledging their letter of May 4th.

Q. Does that acknowledgment refer to Plaintiff's Exhibit No. 3? A. Yes, sir.

Q. Who signed the original paper which you now have in your hand, Plaintiff's Exhibit for Identification No. 4? A. I did.

(Deposition of C. H. Bentley.)

Q. What authority, if any, had you to sign such correspondence in behalf of the association?

A. By authority of the board of directors of the corporation.

Mr. ALLEN.—Move to strike the answer out as not the best evidence.

Motion denied by the Court.

Mr. GORHAM.—Q. Is Plaintiff's Exhibit for Identification No. 4 a part of the files of the association? A. It is.

Mr. GORHAM.—We offer the same in evidence.

Q. I will ask you if you have the original—if the association has the original of that letter of May 8, why the letter of May 8th was sent to C. H. Lilly & Company? Has the association the original or the copy? A. We have merely the copy.

Mr. ALLEN.—We object to it as incompetent, irrelevant and immaterial, and the proper foundation has not been laid.

Objection overruled by the Court.

Mr. GORHAM.—I think that is all.

Cross-examination.

Mr. ALLEN.—Q. Mr. Bentley, you are manager of the sales department, I understand?

A. Yes, sir.

Q. Of all the business of the plaintiff company?

A. Of all the selling.

Q. Passes under your supervision?

A. Yes, sir.

Q. Wherever it might be? A. Yes, sir.

(Deposition of C. H. Bentley.)

Q. Did you have charge of the sales of the goods referred to in that statement of account?

A. Yes, sir.

Mr. GORHAM.—We object as not proper cross-examination and move to strike the answer out.

Mr. ALLEN.—Q. Did you sell those goods?

Mr. GORHAM.—Same objection.

A. Every order in connection with the sales department of this character is passed under my general supervision, all the correspondence relating to it passes under my supervision; in that sense I made that sale.

Mr. ALLEN.—Q. Did you personally take part in the contract of sale?

Mr. GORHAM.—Same objection.

A. Yes, sir.

Mr. ALLEN.—Q. What part did you take in that contract of sale?

Mr. GORHAM.—Same objection.

A. I signed the contract of sale.

Mr. ALLEN.—Q. Have you anything to do with the execution of the contracts of sale after they are made?

Mr. GORHAM.—Same objection.

A. In the case of delinquent accounts it is the custom of the credit department to refer the statements to me and I confer with the treasurer to see what would seem necessary in order to insure the collection.

Mr. ALLEN.—Q. I will ask you whether you

(Deposition of C. H. Bentley.)

know that the merchandise referred to in the account has ever been delivered?

Mr. GORHAM.—Same objection.

A. It has not been delivered.

Mr. ALLEN.—Referring to Plaintiff's Exhibit No. 3 I see some underscores in red pencil; was that on it when you received it? A. No, sir.

Q. That has been placed there since you received it? A. Yes, sir.

Q. By you or do you know by whom?

A. I don't know.

Q. Referring to Plaintiff's Exhibit 4, you stated that that was sent to the defendant, Lilly & Company? A. Yes, sir.

Q. Did you send it, yourself?

A. I dictated the letter and signed it, the custom in our office is for the stenographer to attend to turning it over to the mail clerk.

Q. Then you know nothing of your own personal knowledge as to whether it was sent, only from your custom?

A. We have good reasons—I have reason to believe that it was received in the ordinary course of correspondence because subsequent letters related to the same transaction.

Q. Please produce them, the letters that you have referred to in your testimony in the last answer?

Mr. GORHAM.—Under the same objection, not proper cross-examination.

A. I haven't them with me.

Mr. ALLEN.—Q. Will you obtain them and produce them during the pendency of taking this testimony?

Mr. GORHAM.—We object as not proper demand at this time nor proper method of making the demand for copies; we insist upon counsel making demand in regular way.

A. I answered that: I haven't the letters with me; I will undertake to get them under instructions from counsel.

Mr. ALLEN.—The defendant moves to strike out the volunteered statement of the witness that he is testifying upon information obtained from letters, subsequent correspondence to exhibit No. 4, for the reason that the witness intimates that he will not deliver the letters except upon orders from his counsel. That will do. Take the witness.

Motion denied by the Court.

Mr. GORHAM.—Let the record show that we have nothing further to offer under the notice to take depositions.

Mr. ALLEN.—The defendant has nothing at this time.

Plaintiff's Exhibit No. 1.

"S. L. G. K.N.F.

April 29th, 1908.

C. H. Lilly & Co., Seattle, Wash.

Gentlemen: We enclose herewith statement of your account, and must respectfully insist upon your prompt reply with remittance.

You must concede that we have been more than liberal in letting the account stand so long, and we feel that any fair consideration will insure immediate payment.

We are mindful of the unfortunate market conditions which doubtless hindered the sale of these goods, but you must realize that these conditions prevailed throughout the country. We had to pocket a heavy loss on goods packed in anticipation of normal trade in the Winter and Spring, and we cannot afford to let this account run longer. We have obligations to meet, and must insist upon our customers meeting their obligations to us.

Asking the favor of an immediate reply with remittance, we remain,

Yours very truly,
CALIFORNIA FRUIT CANNERS ASSN.,
Per ————,
Treasurer."

Plaintiff's Exhibit No. 2.

"STATEMENT.

Form 50

San Francisco, April 29th, 1908.
~~Oakland~~,

California Fruit
Canners Association.

M C. H. LILLY & CO.
Seattle, Washington.

In Account With
CALIFORNIA FRUIT CANNERS ASSOCIATION.

Nov	1.	To Mdse	W.H.%	6000	00	
	1.	"	"	1200	00	
	1.	"	"	968	75	
	1.	"	"	248	75	
Dec	5.	To Storage		15	00	
	5.	"		75	00	
	31.	To Mdse		10699	60	
Jan	2.	" Storage		87	25	
	2.	" "		18	25	
Apr	1.	" "		166	39	
	24.	" "		166	39	
						19645 38
Feb	26.	By Claim	Feb. 12	4	28	
	29.	" Mdse	W.H.%	842	17	846 45
						18798 93
Apr	29.	To Interest Balance to date				386 94
						19185 87

To C.H.B. 4/29 Mailed 4/29 (Copy to C.B.C. 3/29/9)

4"

Plaintiff's Exhibit No. 3.

"Tea and Coffee Importers. Cable Address:
Coffee Roasters. 'ORISPICE'
A B C Code 4th Edition.
428

C. H. LILLY & COMPANY.
Frank R. Beckham,
Manager,
WHOLESALE GROCERS.

Railroad Avenue and
Main Street Seattle U.S.A.
May 4/08
C.F.C.A.
Received
May 7 1908 2 24 P M

Answered
May 8 1908
C.H.Bentley
C. H. Bentley
C.H.B.

The Cal. Fruit Canners' Assn.,
San Francisco, Cal.

Gentlemen: We have your favor of Apr. 29th and in reply beg to say we will endeavor to send you a substantial remittance on this account during the ensuing month. We are badly overloaded on canned goods as you undoubtedly know, and have been endeavoring to make some turns on the goods which you are holding in the warehouse for us, but without success to date.

We do appreciate your leniency and expect to do all we can to lighten your burden but will have to ask you to bear with us for the present. Thanking you in advance, we are

Yours very truly,

C.H.LILLY & CO

Per C.H.LILLY" (Signed).

FRB. McMillin

(Red ink underscore)

Plaintiff's Exhibit No. 4.

"CHB. KNF. 428

May 8th, 1908.

C. H. Lilly & Co., Seattle, Wash.

Gentlemen: We thank you for your kind favor of the 4th inst., and assure you that we have no desire to work unnecessary hardships.

If you will kindly advise us what we may expect during the coming month in the way of remittance, so that we may make our plans accordingly, we will appreciate it, and thank you for an immediate reply.

Yours very truly,

CALIFORNIA FRUIT CANNERS ASSN.,

Per ————,

Manager Sales Dept."

[Recital Concerning Testimony and Evidence.]

This concluded the testimony for plaintiff and the foregoing constitutes all of the evidence in the case.

[Motion for a Nonsuit, etc.]

At the close of the foregoing evidence in chief the following proceedings were had:

Mr. PETERS.—Plaintiff having rested, your Honor, the defendant now moves for a nonsuit upon the grounds that no obligation has been shown upon which this account stated, as claimed by the plaintiff, may rest—no consideration—no prior transactions shown back of the account stated. Again, that the promise on the part of Lilly to pay the account, as embodied in this exhibit number 3 to the depositions, this letter of May 4th, was a promise to pay conditioned upon certain goods being in the warehouse to his order. There is no proof that such goods were in the warehouse to Lilly & Company's order; on the contrary the proof is no such goods were there.

After argument of the motion by Mr. Peters and Mr. Allen for the defendant, and Mr. Gorham for the plaintiff, the motion for a nonsuit was granted.

Twenty-third Exception.

To which said ruling of the Court the plaintiff then and there excepted.

And thereupon, on, to wit, the 27th day of January, 1910, the following order and judgment of dismissal was by the Court entered in said cause, to wit:

In the United States Circuit Court, Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Judgment of Dismissal [in Bill of Exceptions].

This cause coming on for trial on the 19th day of January, 1910, plaintiff appearing by their attorney Wm. H. Gorham, Esq., the defendant appearing by its attorneys J. H. Allen, Esq., and W. A. Peters, Esq., and a jury having been impaneled and sworn to try said cause and the plaintiff having offered its evidence, defendant thereupon moved for a nonsuit and judgment of dismissal, and the Court having heard the arguments of counsel and being fully advised in the premises, it is hereby ordered that the said motion be and the same hereby is granted. And it is further ordered that the said cause be and the same hereby is dismissed.

To which ruling of the Court plaintiff excepts and his exception is allowed.

Done in open court this the 27th day of January, 1910.

GEORGE DONWORTH,

Judge.

Twenty-fourth Exception.

To which ruling and order of the Court the plaintiff thereupon then and there excepted as therein recited.

That thereafter, to wit, on the 7th day of March, 1910, the plaintiff served on the defendant, and on the 8th day of March, 1910, filed in said cause its petition for a new trial, which petition is in the words, letters and figures following, to wit:

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Petition for New Trial [in Bill of Exceptions].

Comes now the plaintiff and moves the Court for a new trial in the above-entitled cause, for the following causes materially affecting the substantial rights of plaintiff, to wit:

1. Error in law occurring at the trial, in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?

(Page 9. line 20 of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Then is that the case with each item of merchandise on that statement?

(Page 9, line 28, page 10, line 1, of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

3. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. Then your statement that the goods did not belong to Lilly & Company, but were stored until paid for by them, is that or is that not correct?

(Page 10, line 11 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

4. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness to the following question

propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Mr. ALLEN.—Q. None of the merchandise items, then, on this statement is the property of Lilly & Company?

(Page 10, line 17 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

5. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness to the following questions propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Stored how, as security for the payments—for the account?

(Page 10, line 24 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

6. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question, propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Or as Lilly & Company's property?

(Page 10, line 27 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

7. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, and that it does not

appear the witness is qualified to answer the question, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Where were the goods stored?

(Page 11, line 3 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

8. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Kindly state which warehouse?

(Page 11, line 11 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

9. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Kindly state in which warehouse and the location thereof.

(Page 11, line 16 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

10. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Read the question.

Mr. ALLEN.—Answer the question.

(Page 11, lines 22 and 26 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

11. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. How do you know whether they are stored at all anywhere?

(Page 12, line 25 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

12. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Does your book show in what warehouse these particular goods you have been testifying about are stored?

(Page 13, line 5 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

13. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Does the statement on the books with which you have compared this statement,

as you have testified to hitherto, show where these goods are stored?

(Page 13, line 11 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

14. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Kindly state the names, number and place of your various warehouses?

(Page 13, line 17 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

15. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Kindly give us the location of the two warehouses in San Francisco?

(Page 14, line 3 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

16. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Have you ever seen these goods in person?

(Page 14, line 14 of Depositions of Goldstein et al.)

—to which the plaintiff excepted.

17. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Well, have you?

(Page 14, line 20 of Depositions of Goldstein et al.)

—to which ruling the plaintiff excepted.

18. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Then I understand you, you are testifying to the last question as to your custom?

(Page 15, line 6 of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

19. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. And so far as you know, the usual custom that you just testified to was followed in the case at bar?

(Page 15, line 10 of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

20. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Mr. ALLEN.—Q. Then you are—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement, Plaintiff's Exhibit No. 2, the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?

(Page 15, line 14 of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

21. Error in law occurring at the trial in this: The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. In answering this last question, you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2, were the goods of the California Fruit Canners' Association, and stored with all their other goods?

(Page 15, line 27, page 16, line ½ of Depositions of Goldstein, et al.)

—to which ruling the plaintiff excepted.

22. Error in law occurring at the trial in this: The Court erred in granting the motion of defendant for a nonsuit, to which ruling of the Court the plaintiff excepted.

This petition is based upon the pleadings and papers on file in said cause, and upon the depositions of S. L. Goldstein, W. F. McMillin and C. H. Bentley, filed and read as evidence in said cause, and upon the minutes of the Court in said cause.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Which petition for a new trial was thereafter regularly heard and after argument of counsel for and against said petition, respectively, and after due consideration by the Court, was by the Court on the 19th day of March, 1910, denied.

And now, in furtherance of justice and that right may be done the plaintiff, the California Fruit Canners' Association, tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record.

Dated, Seattle, Washington, March 26th, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

[Order Settling, etc., Bill of Exceptions.]

The foregoing bill of exceptions, having been duly served, filed, settled and allowed within the time allowed by law and being found full, true and correct, the same is hereby settled and allowed this 16th day of April, 1910, in open court, being a regular day of the November term, 1909, in which said cause was tried.

GEORGE DONWORTH,
Judge.

[Endorsed]: Bill of Exceptions as Settled and Allowed. Filed U. S. Circuit Court, Western District of Washington, April 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Petition for, and Order Allowing Writ of Error, etc.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

PETITION FOR WRIT OF ERROR AND FOR AN ORDER FIXING AMOUNT OF SUPERSEDEAS BOND AND ALLOWANCE OF WRIT OF ERROR.

To the Honorable, the Judges of the United States Circuit Court of Appeals, 9th Circuit:

Comes now the above-named plaintiff, by its attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in said cause in the United States Circuit Court for the Western District of Washington, Northern Division, at the November Term, 1909,

thereof, against said plaintiff, on the 27th day of January, 1910, manifest error hath happened to the great damage of said plaintiff;

Wherefore, said plaintiff prays for the allowance of a Writ of Error and for an order fixing the amount of the bond for a Supersedeas in said cause, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals, 9th Circuit.

Dated at Seattle, Washington, April 16, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Allowed this 16th day of April, 1910.

GEORGE DONWORTH,
U. S. District Judge.

[Endorsed]: Petition for Writ of Error and for Order Fixing Amount of Supersedeas Bond and Allowance of Writ of Error. Filed U. S. Circuit Court, Western District of Washington, April 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Assignment of Errors.

Comes now the above-named plaintiff and assigns the following errors upon which it intends to and does rely upon its Writ of Error in the above-entitled cause, from the United States Circuit Court of Appeals, 9th Circuit:

I.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?

To which the witness answered:

A. Those goods belong to the California Fruit Canners Association and are stored in the warehouse until payments are made by Lilly & Company.

To which ruling of the Court the plaintiff excepted.

II.

The Court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Then is that the case with each item of merchandise on that statement?

To which the witness answered:

A. You are speaking of the warehouse goods?

To which counsel for defendant replied: Yes, sir.

To which the witness answered:

A. These goods were charged to Lilly & Company and held for payment.

To which ruling of the Court plaintiff excepted.

III.

The Court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Then your statement that the goods did not belong to Lilly & Company, but were stored until paid for by them, is that or is that not correct?

To which the witness answered:

A. I said the goods were charged to Lilly & Company and they are not their property until they are paid for.

To which ruling of the Court plaintiff excepted.

IV.

The Court erred in overruling plaintiff's objection as not proper cross-examination and as calling for a conclusion of the witness to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. None of the merchandise items, then, on this statement is the property of Lilly Company.

To which counsel for defendant added the further question:

Q. Is that what I am to understand?

To which the witness answered:

A. As I said before, they are stored for Lilly & Company until payments are made.

To which ruling of the Court plaintiff excepted.

V.

The Court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness to the following question propounded by defendant to the witness S. L. Goldstein as cross-examination:

Q. Stored how, as security for the payments—for the accounts?

To which ruling of the Court plaintiff excepted.

VI.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question, propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Or as Lilly & Company's property?

To which the witness answered:

A. Stored for account of Lilly & Company until they are paid.

To which ruling of the Court plaintiff excepted.

VII.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, and it does not appear the witness is qualified to answer the question, to the following question propounded to the witness S. L. Goldstein on cross-examination:

Q. Where were the goods stored?

To which the witness answered:

A. They are stored in one or more of our warehouses.

To which ruling of the Court plaintiff excepted.

VIII.

The Court erred in overruling plaintiff's objection,

as not proper cross-examination to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state which warehouse.

To which the witness answered:

A. I stated in one or more of our warehouses, we have a number of them.

To which ruling of the Court plaintiff excepted.

IX.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state in which warehouse and the location thereof?

To which the witness answered:

A. I told you in one or more of our warehouses; we have a number of warehouses distributed throughout the State of California.

To which ruling of the Court plaintiff excepted.

X.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Read the question. (Last question read.)

To which the witness answered:

A. We have a number of warehouses—

To which ruling of the Court plaintiff excepted.

XI.

The Court erred in overruling plaintiff's objection,

as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Answer the question.

The NOTARY (Mr. SESSIONS).—Mr. Goldstein, if you know the warehouse in which these goods were stored, please state, and if you do not, please state that you do not.

To which the witness answered:

A. I don't know which particular warehouse.

To which ruling of the Court plaintiff excepted.

XII.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. How do you know whether they are stored at all anywhere?

To which the witness answered:

A. We reserve a certain amount—when goods are billed up to a customer they are reserved and stored at one or more of our warehouses, and I know that our books are kept correctly and that goods are withheld for customers to whom they may be charged.

To which ruling of the Court plaintiff excepted.

XIII.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by the defendant to the witness S. L. Goldstein on cross-examination:

Q. Does your book show in what warehouse these particular goods you have been testifying about are stored?

To which the witness answered:

A. That I can't tell.

To which ruling of the Court plaintiff excepted.

XIV.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by the defendant to the witness S. L. Goldstein on cross-examination:

Q. Does the statement on the books with which you compared this statement as you have testified to hitherto, show where these goods are stored?

To which the witness answered:

A. That I can't tell.

To which ruling of the Court plaintiff excepted.

XV.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state the names, number and place of your various warehouses?

To which the witness answered:

A. We have two warehouses here.

Mr. GORHAM.—What do you mean by here?

A. San Francisco—shall I state all the warehouses we have?

Mr. GORHAM.—That is the question.

A. One in Oakland, one in San Leandro, one in Healdsburg, one in Santa Rosa, one in Stockton, one

in Sacramento, one in Visalia, one in Fresno, one in Hanford, one in Los Angeles, Marysville, Chico—that is all I can remember.

To which ruling of the Court plaintiff excepted.

XVI.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly give us the location of the two warehouses in San Francisco?

To which the witness answered:

One is Francisco and Taylor, the other North Point Street.

To which ruling of the Court plaintiff excepted.

XVII.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Have you ever seen these goods in person?

To which the witness answered:

A. These goods are stored in our warehouse.

To which ruling of the Court plaintiff excepted.

XVIII.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Well have you?

To which the witness answered:

A. I might have seen them.

To which ruling of the Court plaintiff excepted.

XIX.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Then I understand you, you are testifying to the last question as to your custom?

Mr. ALLEN.—Is that correct?

To which the witness answered:

A. Yes, sir.

To which ruling of the Court plaintiff excepted.

XX.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. And so far as you know, the usual custom that you just testified to was followed in the case at bar?

To which the witness answered:

A. It is followed in every case.

To which ruling of the Court plaintiff excepted.

XXI.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, the following question propounded by defendant to witness S. L. Goldstein on cross-examination.

Q. Then are you—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement, Plaintiff's Exhibit

No. 2, the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?

To which the witness answered:

A. As I stated before they are stored in stacks.

Mr. ALLEN.—Repeat the question. (Last question read.)

A. I answered the question; all our goods are stored in the stacks until ordered out.

To which ruling of the Court plaintiff excepted.

XXII.

The Court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. In answering this last question you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of the California Fruit Canners Association and stored with all their other goods?

To which the witness answered:

A. The property of the California Canners Association and is stored in stacks with other goods.

To which ruling of the Court plaintiff excepted.

XXIII.

The Court erred in granting the motion of defendant for a nonsuit, to which ruling of the Court the plaintiff excepted.

XXIV.

The Court erred in making, rendering and entering the order and judgment of dismissal, of date January 27, 1910, to which order and judgment plaintiff excepted.

XXV.

The Court erred in granting defendant's motion for an order requiring the plaintiff herein to elect upon which cause of action set forth in its complaint it would sue on, and that after the plaintiff should have made such election that the other cause of action be stricken from the complaint, to which ruling of the Court plaintiff excepted.

XXVI.

The Court erred in making and entering its order of August 30, 1909, granting defendant's motion to require plaintiff to elect as to which of the two causes of action set forth in its complaint it would rely upon, to which order plaintiff excepted.

Wherefore, said plaintiff prays that the judgment of said Circuit Court be reversed, and that said Circuit Court be directed to grant a new trial of said cause.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

[Endorsed]: Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington, Apr. 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Order Fixing Amount of Supersedeas Bond.

Upon motion of William H. Gorham, attorney for the above-named plaintiff, and upon filing a petition for a Writ of Error and an Assignment of Errors:

It is ordered that the amount of the bond on said Writ of Error as a supersedeas in said cause be, and hereby is fixed at $500.00.

Dated Seattle, Washington, April 16, 1910.

GEORGE DONWORTH,

U. S. District Judge and one of the Judges of the United States Circuit Court of Appeals for the 9th Circuit, designated by general assignment.

[Endorsed]: Order Fixing Amount of Supersedeas Bond. Filed U. S. Circuit Court, Western District of Washington, Apr. 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Writ of Error [Lodged Copy].

The President of the United States of America to the Honorable Judges of the United States Circuit Court for the Western District of Washington, Northern Division.

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said United States Circuit Court before you, between the California Fruit Canners Association, a corporation, plaintiff, and Charles H. Lilly, defendant, a manifest error hath happened, to the great damage of said California Fruit Canners Association, plaintiff in error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment be therein given, that then

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, State of California, on the 16th day of May, 1910. next, in the said Circuit Court of Appeals to be then and there held; that the records and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of April, 1910.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, Western District of Washington, Northern Division.
By W. D. Covington,
Deputy.

Allowed:

GEORGE DONWORTH,
U. S. District Judge.

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 18th day of April, 1910.

(Signed) J. H. ALLEN,
Attorney for Defendant in Error, Charles H. Lilly.

The within copy of Writ of Error lodged in the clerk's office of the United States Circuit Court,

Western District of Washington, Northern Division, for defendant in error, this 18th day of April, 1910.

A. REEVES AYRES,

Clerk of U. S. Circuit Court, Western District of Washington, Northern Division.

By W. D. Covington,

Deputy.

[Endorsed]: Lodged Copy of Writ of Error. Filed U. S. Circuit Court, Western District of Washington, April 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Bond on Writ of Error.

Know All Men by These Presents: That we, the California Fruit Canners Association, a corporation,

of California, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Charles H. Lilly in the full and just sum of five hundred no/100 dollars ($500.00), to be paid to the said Charles H. Lilly, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 16th day of April, 1910.

Whereas lately, at a Circuit Court of the United States in a suit depending in said Court between the California Fruit Canners Association, plaintiff, and Charles H. Lilly, defendant, a judgment was rendered against the said California Fruit Canners Association, and the said California Fruit Canners Association having obtained a Writ of Error and filed a copy thereof in the clerk's office of the said Circuit Court to reverse the judgment in the aforesaid suit, and a Citation directed to the said Charles H. Lilly citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals, Ninth Circuit, to be holden at the city of San Francisco, on the 16th day of May, 1910.

Now, the condition of the above obligation is such that if the said California Fruit Canners Association shall prosecute said Writ of Error to effect, and answer all damages and costs if it fails to make its

plea good, then the above obligation to be void; else to remain in full force and virtue.

CALIFORNIA FRUIT CANNERS' ASSOCIATION.

By WILLIAM H. GORHAM,
Its Attorney and Agent.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] By JOHN A. WHALLEY,
Attorney in Fact.

Attest: A. W. WHALLEY,
Agent.

Approved:

GEORGE DONWORTH,
Judge of the U. S. District Court.

[Endorsed]: Bond for Writ of Error. Filed U. S. Circuit Court, Western District of Washington, Apr. 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Stipulation and Order Extending Time to Prepare etc., Bill of Exceptions.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION

vs.

CHARLES H. LILLY.

It is hereby stipulated by the parties to the above-entitled cause:

That the plaintiff may have until the 26th day of March, 1910, within which to prepare, serve and file its draft of its proposed bill of exceptions in the above-entitled cause.

Dated Seattle, Washington, March 15, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.
JOHN H. ALLEN,
W. A. PETERS,
Attorney for Defendant.

Upon reading and filing the foregoing stipulation;

It is ordered that the time within which plaintiff may prepare, serve and file its draft of its Bill of Exceptions in the above-entitled cause be, and the same is hereby extended to March 26, 1910.

Dated Seattle, Washington, March 18, 1910.

GEORGE DONWORTH,
Judge.

[Endorsed]: Stipulation and Order. Filed U. S. Circuit Court, Western District of Washington, Mar. 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Notice of Filing Bill of Exceptions.

To Charles H. Lilly, the Above-named Defendant, and to J. H. Allen, Esq., and W. A. Peters, Esq., His Attorneys:

You and each of you are hereby notified that the plaintiff in the above-entitled cause, desiring and intending to prosecute a Writ of Error from the judgment of the above-entitled cause, entered on the 27th day of January, 1910, has prepared and this day filed in the office of the clerk of the above-entitled court, and presented to the Honorable George Donworth, the Judge who tried said cause, its proposed Bill of Exceptions in said cause, a copy of which is herewith this day served upon you.

Dated Seattle, Washington, March 25, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of above Notice, together with copy of Plaintiff's proposed Bill of Exceptions, received this 25th day of March, 1910.

JOHN H. ALLEN,
W. A. PETERS,
Attorney for Defendant.

[Endorsed]: Notice of Filing Proposed Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Mar. 25, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In United States Circuit Court, at Seattle.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION,

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Stipulation [for Settlement, etc., of Bill of Exceptions].

It is hereby stipulated by and between the parties to the above-entitled cause that the Bill of Exceptions heretofore by the plaintiff served and filed herein may be settled, allowed, signed and certified to as filed by the Honorable George Donworth,

United States District Judge, presiding at the trial of said cause in the above-entitled court.

Dated Seattle, April 16, 1910.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

J. H. ALLEN,
Attorney for Defendant.

[Endorsed]: Stipulation. Filed U. S. Circuit Court, Western District of Washington. April 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),
Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,
Defendant.

Writ of Error [Copy].

The President of the United States of America to the Honorable Judges of the United States Circuit Court for the Western District of Washington, Northern Division:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said United States Circuit Court before you, between the California Fruit Canners Association, a corporation, plaintiff, and Charles H. Lilly, de-

fendant, a manifest error hath happened, to the great damage of said California Fruit Canners Association, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 16th day of May, 1910, next, in the said Circuit Court of appeals to be then and there held; that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of April, 1910.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, Western District of Washington, Northern Division.
By W. D. Covington,
Deputy.

Allowed:

GEORGE DONWORTH,
U. S. District Judge.

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 18th day of April, 1910.

J. H. ALLEN,

Attorney for Defendant in Error, Charles H. Lilly.

[Endorsed]: Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Apr. 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

Citation [Copy].

The President of the United States of America to Charles H. Lilly, Greeting:

You are hereby cited and admonished to be and appear at a United States *Circuit of* Appeals, Ninth Circuit, to be holden at the city of San Francisco, State of California, on the 16th day of May, 1910, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein the California Fruit Canners Association is plaintiff and you are defendant, to show cause, if any there be, why the judgment rendered against said plaintiff should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of April, 1910.

[Seal] GEORGE DONWORTH,

U. S. District Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Charles H. Lilly, by handing to and leaving a true and correct copy thereof with John H. Allen, Attorney of Record for the said Charles H. Lilly, personally at Seattle, in said District on the 18th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal.
By Geo. B. Devenpeck,
Deputy.

Dated April 18, 1910.

Fees: $2.12.

[Endorsed]: Citation. Filed U. S. Circuit Court, Western District of Washington. April 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare and transmit, under your hand and seal of the United States Circuit Court for the Western District of Washington, Northern Division, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with the original Writ of Error issued and allowed by the Honorable George Donworth, United States District Judge, on the 16th day of April, 1910, returnable to the United States Circuit Court of Appeals, for the Ninth Circuit, so that you have the same at San Francisco, State of California, on the 16th day of May, 1910, as your return to said Writ of Error, a true copy of so much of the record in said cause in the said United States Circuit Court as is designated below, together with a true copy of the Assignment of Errors filed with the petition of the above-named plaintiff for a Writ of Error, to wit:

1. Summons and Return Thereon.
2. Complaint.
3. Motion of defendant to require plaintiff to elect.
4. Order of August 30, 1909, requiring plaintiff to elect.
5. Amended Complaint.
6. Answer.
7. Reply.
8. Plaintiff's motion for leave to amend Reply.
9. Order of Jany. 3, 1910, granting leave to amend Reply.

10. Defendant's demand for copy.
11. Plaintiff's Answer to said Demand.
12. Plaintiff's Motion for Bill of Particulars.
13. Defendant's Bill of Particulars.
14. Plaintiff's motion for an order for inspection of statement and letter.
15. Order of September 27, 1909, granting said motion.
16. Judgment.
17. Cost Bill as taxed.
18. Plaintiff's petition for new trial.
19. Order of March 19, 1910, denying said petition.
20. Order of February 18, 1910, extending time for preparing, serving and filing Bill of Exceptions.
21. Bill of Exceptions with order of April 16, 1910, settling and allowing the same.
22. Petition for Writ of Error with allowance of same.
23. Assignment of Errors.
24. Order of April 16, 1910, fixing amount of Supersedeas.
25. Writ of Error lodged with you.
26. Bond on Writ of Error with approval thereof.
27. This Praecipe.
28. Stipulation and order of 3/18/10, extending time to file Bill of Exceptions.
29. Notice of filing Bill of Exceptions.
30. Stipulation of April 16, 1910.

And you will please annex to and transmit with such record a copy of the Opinion of the said United States Circuit Court on the Motion for a nonsuit in

said cause and the original Citation in said cause, together with admission of service thereof.

Dated Seattle, April 16, 1910.

WILLIAM H. GORHAM,

Attorney for Above-named Plaintiff, California Fruit Canners' Association.

[Endorsed]: Praecipe for Transcript. Filed U. S. Circuit Court, Western District of Washington. April 16, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS' ASSOCIATION (a Corporation),

Plaintiff in Error,

vs.

CHAS. H. LILLY, Doing Business as C. H. LILLY & CO.,

Defendant in Error.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby certify the foregoing one hundred and fifty-six (156) typewritten pages, numbered

from 1 to 156, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of attorney for plaintiff in error, as the same remain of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of $97.30, and that the said sum has been paid to me by William H. Gorham, Esquire, attorney for plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 7th day of June, 1910.

[Seal] A. REEVES AYRES,
Clerk.
By W. D. Covington,
Deputy Clerk.

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1761.

CALIFORNIA FRUIT CANNERS ASSOCIATION (a Corporation),

Plaintiff,

vs.

CHARLES H. LILLY, Doing Business as C. H. LILLY & COMPANY,

Defendant.

Writ of Error [Original].

The President of the United States of America to the Honorable Judges of the United States Circuit Court for the Western District of Washington, Northern Division:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the said United States Circuit Court before you, between the California Fruit Canners Association, a corporation, plaintiff, and Charles H. Lilly, defendant, a manifest error hath happened, to the great damage of said California Fruit Canners Association, plaintiff in error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 16th day of May, 1910 next, in the said Circuit Court of Appeals to be then and there held; that the records and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of April, 1910.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, Western District of Washington, Northern Division.
By W. D. Covington,
Deputy.

Allowed:

GEORGE DONWORTH,
U. S. District Judge.

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 18th day of April, 1910.

J. H. ALLEN,
Attorney for Defendant in Error, Charles H. Lilly.

[Endorsed]: No. 1761. In the United States Circuit Court for the Western District of Washington, Northern Division. California Fruit Canners Association vs. Charles H. Lilly, Doing Business as C. H. Lilly & Company. Writ of Error. Filed U. S. Circuit Court, Western District of Washington. Apr. 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

Citation [Original].

The President of the United States of America, to Charles H. Lilly, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, Ninth Circuit, to be holden at the city of San Fran-

cisco, State of California, on the 16th day of May, 1910, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein the California Fruit Canners Association is plaintiff and you are defendant, to show cause, if any there be, why the judgment rendered against said plaintiff should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of April, 1910.

[Seal] GEORGE DONWORTH,
U. S. District Judge.

Personal Service of this Citation on me, at Seattle, Washington, this —— day of ————, 1910, hereby admitted.

Dated Seattle, Washington, ————, 1910.

————————,
Attorney for Defendant, Charles H. Lilly.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Charles H. Lilly by handing to and leaving a true and correct copy thereof with John H. Allen, attorney of record for

the said Charles H. Lilly, personally, at Seattle, in said District, on the 18th day of April, A. D. 1910.

Dated April 18, 1910.

C. B. HOPKINS,
U. S. Marshal,
By Geo. B. Devenpeck,
Deputy.

Fees: $2.12.

[Endorsed]: No. 1761. In the United States Circuit Court for the Western District of Washington, Northern Division. California Fruit Canners' Association vs. Charles H. Lilly, Doing Business as C. H. Lilly & Company. Citation. Filed U. S. Circuit Court, Western District of Washington. Apr. 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

[Endorsed]: No. 1863. United States Circuit Court of Appeals for the Ninth Circuit. The California Fruit Canners' Association (a Corporation), (Plaintiff), Plaintiff in Error, vs. Charles H. Lilly, Doing Business as C. H. Lilly & Company (Defendant), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Filed June 10, 1910.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

In The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION, a Corporation (plaintiff),

Plaintiff in Error.

vs.

CHARLES H. LILLY, doing business as C. H. LILLY & COMPANY (defendant),

Defendant in Error.

No. 1863

UPON WRIT OF ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

THOMAS, GERSTLE, FRICK & BEEDY,
WILLIAM H. GORHAM,
Attorneys for Plaintiff in Error.

In The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION, a Corporation (plaintiff),

Plaintiff in Error.

vs.

CHARLES H. LILLY, doing business as C. H. LILLY & COMPANY (defendant),

Defendant in Error.

No. 1863

UPON WRIT OF ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The original complaint in this case contained two causes of action: one, on an unpaid balance of an account

for goods, wares and merchandise sold and delivered by plaintiff in error (plaintiff below) to defendant in error (defendant below) under contracts set out in full; and the second cause of action, on an account stated in writing between plantiff and defendant upon which a balance (in the same amount as in the first cause of action) was found due from defendant to plaintiff which defendant agreed in writing to pay, but which defendant had failed to pay.

On motion of defendant the court entered an order, over the objection of plaintiff, requiring the plaintiff to elect upon which cause of action in the complaint it would sue; whereupon an amended complaint was filed containing the cause of action on the account stated as set forth in the second cause of action in the original complaint.

Before issue was joined the defendant demanded and plaintiff furnished a copy of the account stated and of the agreement to pay the same. (Record, pp. 36, 37, 38 and 39.)

The defendant filed his answer denying the account stated and agreement to pay; setting up as affirmative defense that he had been induced by fraud of plaintiff to agree to pay for certain goods plaintiff had represented it had stored in warehouses subject to defendant's order; and setting up as a second affirmative defense and counterclaim (1) that he had been induced by fraud of plaintiff to agree to pay for certain goods plainti ffhad repre-

sented it had stored in warehouses subject to defendant's order; (2) that plaintiff had confessed that the goods were not of the grade or quality represented to defendant; and (3) had agreed to remedy defect and reimburse defendant damages or injury caused thereby; but (4) had failed to comply with its said agreement; and (5) that defendant, before discovering that the goods were not up to quality, had received and paid for a large quantity of the goods; and (6) had sold and distributed the same to his customers representing them of grade and quality represented by plaintiff; (7) that subsequent to rendition of the account by plaintiff to defendant, as claimed by plaintiff, the goods were repudiated by defendant's customers and in many instances returned to defendant; (8) that defendant's customers refused to pay for the same; and (9) that in consequence thereof and by reason of the deficiency of grade and quality of the goods defendant had been damaged, in the amount of which damages he prayed judgment against plaintiff.

The plaintiff's reply denied each and every allegation contained in the first and second affirmative defense and counterclaim.

Subsequent to issue being joined and at a time prior to the trial, the depositions of S. L. Goldsmith, W. F. McMillin and others, witnesses on behalf of plaintiff, were taken in support of the allegations of the amended complaint as to the account stated and the agreement

to pay, the balance found due thereby, and the non-payment thereof.

At the trial the depositions were read in evidence and the exhibits attached to the depositions offered and received in evidence.

At the trial the order of reading the deposition of Goldsmith and McMillin, and offering Exhibit No. 2 (the account stated) in evidence, was as follows:

1. Direct examination of Goldsmith.

2. Direct examination of McMillin.

3. Exhibit No. 2 (account stated) offered and received in evidence (Record, p. 93).

4. Cross examination of McMillin.

5. Cross examination of Goldsmith. (Record, p. 76.)

The depositions of plaintiff's witnesses, together with Exhibits Nos. 1, 2, 3 and 4, excluding Goldsmith's cross examination, tended to show, sufficiently to go to the jury.

(a) Transactions between the parties upon which an account stated could be based;

(b) An account stated in writing between the parties upon which a balance was found due from defendant to plaintiff;

(c) An agreement in writing on the part of defendant to pay plaintiff that balance;

(d) A failure of defendant to pay that balance.

The cross examination of Goldsmith, read and admitted in evidence at the trial by the court over the objection of plaintiff, tended to show: that the goods in question were stored in warehouses until payments were made by defendant; that they were stored in stacks, stacked in large stacks; there were a good many thousand cans; that as orders came in they were labeled, cased and shipped, and in the meantime they were in stacks; that the goods were stored in stacks with other goods; that the goods belonged to the plaintiff and were the property of the plaintiff and were stored for account of defendant until they were paid for.

This testimony of Goldsmith, on cross examination tending to this showing, was elicited in response to questions propounded by defendant touching particular items of the account stated, Exhibit No. 2, which at the time of such cross examination had been identified by Goldsmith but had not been offered or received in evidence and concerning which particular items or the goods they related to, Goldsmith had not been interrogated on his direct examination.

At the close of the reading of the depositions, and the offering and reception of Exhibits Nos. 1 to 5, inclusive, in evidence, the plaintiff rested; whereupon defendant

moved to strike the testimony contained in the depositions, which motion was denied by the court; whereupon defendant moved for a non-suit, which was granted, and the jury was discharged from further consideration of the case.

Thereafter a petition for a new trial was interposed by plaintiff and denied by the court; whereupon upon motion of defendant a judgment of dismissal was entered by the court dismissing said cause.

The plaintiff brings error to this court.

ASSIGNMENT OF ERRORS.

The following is the specification of errors upon the part of the Circuit Court relied upon, alleged and intended to be urged upon this appeal.

I.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?

To which the witness answered:

A. Those goods belong to the California Fruit Canners' Association and are stored in the warehouse until payments are made by Lilly & Company.

To which ruling of the court the plaintiff excepted.

II.

The court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Then is that the case with each item of merchandise on that statement?

To which the witness answered:

A. You are speaking of the warehouse goods?

To which counsel for defendant replied: Yes, sir.

To which the witness answered:

A. These goods were charged to Lilly & Company and held for payment.

To which ruling of the court plaintiff excepted.

III.

The court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Then your statement that the goods did not belong to Lilly & Company, but were stored until paid for by them, is that or is that not correct?

To which the witness answered:

A. I said the goods were charged to Lilly & Company and they are not their property until they are paid for.

To which ruling of the court plaintiff excepted.

IV.

The court erred in overruling plaintiff's objection as not proper cross-examination and as calling for a conclusion of the witness to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. None of the merchandise items, then, on this statement is the property of Lilly Company.

To which counsel for defendant added the further question:

Q. Is that what I am to understand?

To which the witness answered:

A. As I said before, they are stored for Lilly & Company until payments are made.

To which ruling of the court plaintiff excepted.

V.

The court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness to the following question propounded by defendant to the witness S. L. Goldstein as cross-examination:

Q. Stored how, as security for the payments—for the accounts?

To which ruling of the court plaintiff excepted.

VI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question, propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Or as Lilly & Company's property?

To which the witness answered:

A. Stored for account of Lilly & Company until they are paid.

To which ruling of the court plaintiff excepted.

VII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, and it does not appear the witness is qualified to answer the question, to the following question propounded to the witness S. L. Goldstein on cross-examination:

Q. Where were the goods stored?

To which the witness answered:

A. They were stored in one or more of our warehouses.

To which ruling of the court plaintiff excepted.

VIII.

The court erred in overruling plaintiff's objection, as not proper cross-examination to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state which warehouse.

To which the witness answered:

A. I stated in one or more of our warehouses, we have a number of them.

To which ruling of the court plaintiff excepted.

IX.

The court erred in overruling plaintiff's objection, as not proper cross- examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state in which warehouse and the location thereof?

To which the witness answered:

A. I told you in one or more of our warehouses; we have a number of warehouses distributed throughout the State of California.

To which ruling of the court plaintiff excepted.

X.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following ques-

tion propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Read the question. (Last question read.)

To which the witness answered:

A. We have a number of warehouses—

To which ruling of the court plaintiff excepted.

XI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Answer the question.

The NOTARY (Mr. SESSIONS).—Mr. Goldstein, if you know the warehouse in which these goods were stored, please state, and if you do not, please state that you do not.

To which the witness answered:

A. I don't know which particular warehouse.

To which ruling of the court plaintiff excepted.

XII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. How do you know whether they are stored at all anywhere?

To which the witness answered:

A. We reserve a certain amount—when goods are billed up to a customer they are reserved and stored at one or more of our warehouses, and I know that our books are kept correctly and that goods are withheld for customers to whom they may be charged.

To which ruling of the court plaintiff excepted.

XIII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by the defendant to the witness S. L. Goldstein on cross-examination:

Q. Does your books show in what warehouse these particular goods you have been testifying about are stored?

To which the witness answered:

A. That I can't tell.

To which ruling of the court plaintiff excepted.

XIV.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following questions propounded by the defendant to the witness S. L. Goldstein on cross-examination:

Q. Does the statement on the books with which you compared this statement as you have testified to hitherto, show where these goods are stored?

To which the witness answered:

A. That I can't tell.

To which ruling of the court plaintiff excepted.

XV.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state the names, number and place of your various warehouses?

To which the witness answered:

A. We have two warehouses here.

Mr. GORHAM.—What do you mean by here?

A. San Francisco—shall I state all the warehouses we have?

Mr. GORHAM.—That is the question.

A. One in Oakland, one in San Leandro, one in Healdsburg, one in Santa Rosa, one in Stockton, one in Sacramento, one in Visalia, one in Fresno, one in Hanford, one in Los Angeles, Marysville, Chico—that is all I can remember.

To which ruling of the court plaintiff excepted.

XVI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly give us the location of the two warehouses in San Francisco?

To which the witness answered:

A. One is Francisco and Taylor, the other North Point Street.

To which ruling of the court plaintiff excepted.

XVII. ....

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Have you ever seen these goods in person?

To which the witness answered:

A. These goods are stored in our warehouse.

To which ruling of the court plaintiff excepted.

XVIII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Well, have you?

To which the witness answered:

A. I might have seen them.

To which ruling of the court plaintiff excepted.

XIX.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Then I understand you, you are testifying to the last question as to your custom?

Mr. ALLEN.—Is that correct?

To which the witness answered:

A. Yes, sir.

To which ruling of the court plaintiff excepted.

XX.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. And so far as you know, the usual custom that you just testified to was followed in the case at bar?

To which the witness answered:

A. It is followed in every case.

To which ruling of the court plaintiff excepted.

XXI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, the following question propounded by defendant to witness S. L. Goldstein on cross- examination:

Q. Then are you—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement, Plaintiff's Exhibit No. 2, the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?

To which the witness answered:

A. As I stated before they are stored in stacks.

Mr. ALLEN.—Repeat the question. (Last question read.)

A. I answered the question; all our goods are stored in the stocks until ordered out.

To which ruling of the court plaintiff excepted.

XXII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. In answering this last question you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of the California Fruit Canners Association and stored with all their other goods?

To which the witness answered:

A. The property of the California Canners Association and is stored in stacks with other goods.

To which ruling of the court plaintiff excepted.

XXIII.

The court erred in granting the motion of defendant for a nonsuit to which ruling of the court the plaintiff excepted.

XXIV.

The court erred in making, rendering and entering the order and judgment of dismissal, of date January 27, 1910, to which order and judgment plaintiff excepted.

XXV.

The court erred in granting defendant's motion for an order requiring the plaintiff herein to elect upon which cause of action set forth in its complaint it would sue on, and that after the plaintiff should have made such election that the other cause of action be stricken from the complaint, to which ruling of the court plaintiff excepted.

XXVI.

The court erred in making and entering its order of August 30, 1909, granting defendant's motion to require

plaintiff to elect as to which of the two causes of action set forth in its complaint it would rely upon, to which order plaintiff excepted.

The proposition of law and fact for which we contend are:

POINTS AND AUTHORITIES.

I.

AN ACCOUNT WAS STATED BETWEEN THE PARTIES.

On April 29th, 1908, plaintiff in error wrote defendant in error, enclosing a statement of account showing that there was due Nineteen Thousand One Hundred Eighty-Five and 87/100 Dollars ($19,185.87).

"S. L. G. K. N. F.

April 29th, 1908.

C. H. Lilly & Co., Seattle, Wash.

Gentlemen: We enclose herewith statement of your account, and must respectfully insist upon your prompt reply with remittance.

You must concede that we have been more than liberal in letting the account stand so long, and we feel that any fair consideration will insure immediate payment.

We are mindful of the unfortunate market conditions which doubtless hindered the sale of these goods, but you must realize that these conditions prevailed throughout the country. We had to pocket a heavy loss on goods packed in anticipation of normal trade in the Winter and Spring, and we cannot afford to let this account run longer. We have obligations to meet, and must insist upon our customers meeting their obligations to us.

Asking the favor of an immediate reply with remittance, we remain, Yours very truly,

CALIFORNIA FRUIT CANNERS ASSN.

Per .....

Treasurer.

PLAINTIFF'S EXHIBIT NO. 2.

STATEMENT.

San Francisco, April 29th, 1908.

California Fruit Canners Association.

M. C. H. LILLY & CO.

Seattle, Washington.

In Account With

CALIFORNIA FRUIT CANNERS' ASSOCIATION.

Nov.	1.	To Mdse., W. H. a-c.	$ 6,000.00	
"	1.	" "	1,200.00	
"	1.	" "	968.75	
"	1.	" "	248.75	
Dec.	5.	To Storage	15.00	
"	5.	"	75.00	
"	31.	To Mdse.	10,699.60	
Jan.	2.	To Storage	87.25	
"	2	"	18.25	
Apr.	1.	"	166.39	
"	24.	"	166.39	
			----------	$19,645.38
Feb.	26.	By claim Feb. 12	4.28	
"	29.	By Mdse. W. H. a-c	842.17	846.45
			----------	$18,798.93
Apr.	29.	To interest bal. to date		386.94

				$19,185.87

To C. H. B. 4-29 Mailed 4-29 (Copy to C. B. C. 3-29-9)

And on May 7th, 1908, plaintiff received a reply dated at Seattle, May 4th, 1908, acknowledging receipt of the letter of April 29th and stating:

"We have your favor of Apr. 29th and in reply beg to say we will endeavor to send you a substantial remittance on this account during the ensuing month. We are badly overloaded on canned goods as you undoubtedly know, and have been endeavoring to make some terms on the goods which you are holding in the warehouse for us, but without success to date."

(Trans. Pages 102-105, Plaintiff's Exhibits Nos. 1-2-3.)

"An account stated is an agreement between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance."

1 *Am. & Eng. Enc. of Law and Practice,* p. 688.

"The meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of account by one party and an acquiescence therein by the other. The form of the acquiescence or assent is, however, immaterial, and may be implied from the conduct of the parties and the circumstances of the case."

Idem P. 693.

In *Henry v. March,* 75 Cal. 566, the action was on an account stated. Plaintiff's witnesses testified that the account was made up and presented to the defendant, who went over it with the expert, and "made no objections whatever to the account," from the time it was presented to him in August, 1881, "until after the suit was brought" on November 25th, 1881.

This was held to be a sufficient acquiescence from which to imply an assent.

The court said (p. 567):

"This was a sufficient acquiescence from which to imply an assent. It seems to be well settled that the assent may be implied. In *Terry v. Sickles,* 13 Cal. 427, the court, per Cope, J., said: 'If the account be sent to the debtor, and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated.' In relation to this subject Judge Story says: 'It is sufficient if it has been examined and accepted by both parties, and this acceptance need not be express, but may be implied from circumstances. Between merchants at home, an account which has been presented and no objection made thereto after the lapse of several posts is treated, under ordinary circumstances, as being by acquiescence a stated account. Between merchants in different countries a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other and no objection is made after several opportunities of writng have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account.' (1 Story's Eq. Jur., sec. 526.). The same rule is laid down by Greenleaf. (2 Greenl. Ev., sec. 126.)"

In *Spellman v. Muehfeld,* (166 N. Y. 245), 59 N. E. 817, Parker, C. J., speaking for the court, said:

"Plaintiff, as receiver of a corporation of which defendant was formerly president, sought to recover upon an account stated. After the testimony was all in, the trial court dismissed the complaint, and the appellate division, in affirming the judgment entered thereon, held that the plaintiff had failed to establish a cause of action. With such determinaton there would be no opportunity for quarrel, provided it was necessary, in order to make out the plaintiff's case, that he should show an express assent to the correctness of the account. The case has heretofore been considered apparently on the theory that one who seeks to prove an account stated assumes that burden. But this is not so, for it is quite suf-

ficient for a party to prove facts from which an assent may be implied, and the cases, with which the reports abound, present nearly, if not quite, as many instances in which the plaintiff has relied upon facts from which it was asked that an assent to the account should be implied as where it was claimed that an express assent had been proved. The rule governing accounts stated arose from the practice of merchants, and was first applied by courts of chancery to merchants only; but after a time it was extended to cases at law. As between merchants at home, an account which had been presented, and no objection made thereto, was, after the lapse of several posts, treated under ordinary circumstances as being by acquiescence a stated account (*Sherman v. Sherman,* 2 Vern. 276); while between merchants in different countries a longer time was given. But, if no objection was made after several opportunities of writing, it was considered an acquiescence. *Willis v. Jernegan,* 2 Atk. 251; *Tickel v. Short,* 2 Ves. Sr. 239. And so when Judge Story came to write upon this subject he said, 'What is a reasonable time is to be judged of by the habits of business at home and abroad.' 1 Story, Eq. Journal, sec. 526. While the rule has been confined in some jurisdictions to merchants, it has in most of the states of this country been extended to all classes; and it is so in this jurisdiction, with the possible exception that the courts have not attempted to lay down any general test by which to determine what constitutes a reasonable time for the retention of an account in order to make it an account stated. In *Lockwood v. Thorne,* 11 N. Y. 170, Judge Parker, writing for the court, asserted the general rule to be that, where an account showing a balance is rendered, the party receiving it is bound within a reasonable time to examine it, and object if he dispute its correctness. If he omit to do so, he will be deemed from his silence to have acquiesced, and will be bound by it as an account stated, in absence of proof of fraud or mistake. In such a case the assent is not expressed, but it is implied from the fact of a retention of the account for a period of time without objection to any of its items. The mere retention of an account without objection for a reasonable length of time is said to *prima facie* establish assent to its correctness by the party receiving it, but this may

be overborne by proof of circumstances tending to a contrary inference. *Lockwood v. Thorne,* 18 N. Y. 285. Therefore, while the proposition is correctly laid down in *Volkening v. De Graaf,* 81 N. Y. 268, that 'an account stated is an account balanced and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance,' nevertheless, in proving an account stated, 'it is not necessary to show an express examination of the respective demands or claims of the parties, or an express agreement to the final adjustment. All this may be implied from circumstances.' *Lockwood v. Thorne,* 18 N. Y. 285, 288. In the same case it is said that: 'An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without other proof.' These authorities were recently approved in *Brake Co. v. Prosser,* 157 N. Y. 289, 51 N. E. 986, and in the course of the opinion, the necessity of an assent being under consideration, it was said, 'It need not be by direct and express assent, but such assent may be implied from the circumstances.' "

Mayberry v. Cook, 121 Cal. 588.

Auzerais v. Naglee, 74 Cal. 60.

Lockwood v. Thorne, 11 N. Y. 170.

II.

PLAINTIFF MADE A PRIMA FACIE CASE WHEN IT PROVED THE SENDING OF A STATEMENT OF ACCOUNT AND DEFENDANT'S ACQUIESCENCE IN ITS CORRECTNESS AND DESIRE TO MAKE A PAYMENT THEREON.

The answer denied that an account was stated between plaintiff and defendant, and in two affirmative

defences alleged that plaintiff had made certain false representations, with respect to the goods being subject to its order and as to the quality of them. In order, therefore, to establish a *prima facie* case, plaintiff was only required to prove the sending of the account, which, of course, showed that previous transactions of a monetary character had existed between the parties, and defendant's acquiesence in the correctness of the account.

In *Barr v. Lake*, 126 S. W., 755, the court said at p. 757:

"The theory of the law is that an account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. 1 *Am. & Eng. Enc. Law* (2nd Ed.) 456; *Cape Giradeau, etc. R. R. Co. v. Kimmel*, 58 Mo. 83; *Koegal v. Givens*, 79 Mo. 77; *Columbia Brewing Co. v. Berney*, 90 Mo. App. 96; *Burger v. Burger*, 34 Mo. App. 153. In view of the principle thus established, the law forbids an inquiry into the validity of the items composing the original cause of action, which question is merged in the new promise on the stated account, except upon valid grounds affording relief in other contractual matters, such as fraud, accident, or mistake. The very purpose of an account stated is to foreclose matters of dispute with respect to the various items thereof which afford the consideration for the new promise involved in the stated account, and therefore the law forbids an inquiry into the validity of a portion of the items of which the original cause of action was composed unless it be on the grounds of fraud, accident, or mistake. That is to say, the validity of portions of the original account may not be required into under a general denial. *Columbia Brewing Co. v. Berney*, 90 Mo. App. 96; 1 *Enc. Pl. & Pr.*, 89; *Martin v. Beckwith*, 4 Wis. 219; *Warner v. Myrick*, 16 Minn. 91 (Gil. 81); *Moody v. Thwing*, 46 Minn. 511, 49 N. W. 229; 1 *Am. & Eng. Enc. Law* (2nd Ed.) 456."

"An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. Accordingly, an action thereon is not founded upon the original items, but upon the balance agreed to by the parties, and, therefore, it is not necessary in such an action to prove the items of the original account, nor can the items of the original cause of action be inquired into unless ground is laid for opening, falsifying, or surcharging the account."

1 *Enc. L. & P.*, 716 *et seq.*

Green v. Thornton, 96 Cal. 67, 30 Pac. 965.

McCarthy v. Mt. Tecarbe Land Co., 111 Cal. 328, 43 Pac. 956.

Converse v. Scott, 137 Cal. 239, 70 Pac. 13.

Auzerais v. Naglee, 74 Cal. 60.

In *Green v. Thornton,* 96 Cal. 67 (30 Pac. 965), the court said (page 71 et seq.):

"An account stated is defined by Bouvier to be 'an agreed balance of accounts; an account which has been examined and accepted by the parties.' It implies an admission that the account is correct, and that the balance struck is due and owing from one party to the others. And its effect is to establish *prima facie* the accuracy of the items without other proof, and to constitute a new contract on which an action will lie. (*Auzearis v. Naglee,* 74 Cal. 60)."

Samson v. Freedman, (102 N. Y. 699) 7 N. E. 419.

Hunt v. Stockton Lumber Co., (113 Ala. 387), 21 So. 454.

Cross v. Sacramento Savings Bank, 66 Cal. 462; 6 Pac. 94.

Lanier v. Union Mtg. Etc. Co., (64 Ark. 39), 40 S. W. 466.

McKinster v. Hitchcock, (19 Neb. 100), 26 N. W. 705.

Gordon v. Frazer, 13 App. Cas. 382; (D. C.).

In *Dick v. Zimmerman,* (207 Ill. 636), 69 N. E. 754, an action was brought in *assumpsit.* Declaration consisted of the common counts and attached thereto was a copy of the account sued on. Appellee introduced no evidence to prove the items of account, but relied solely on an account stated, and it appeared from his testimony that, at the request of appellant, he had submitted the account to him and that, after an examination thereof, appellant conceded it to be correct and promised to pay it. Appellant, on his cross-examination of appellee, attempted to show the transaction out of which the account arose. to show that the items were not correct; but the court refused to permit him to do so, stating that there was nothing to cross-examine him about except the interviews and the letters.

The court said (p. 755):

"This suit was tried on the part of the plaintiff upon that count of the narr. declaring upon account stated. He testified in his own behalf to interviews with the defendant, in which the account was presented to the defendant, discussed between them, agreed upon as correct, and that in the last of these interviews defendant, agreed to pay the balance shown by the statement of the account, and plaintiff also testified to the writing of three letters by himself to the defendant, copies of which were admitted in evidence, and to other matters tending to show that the defendant received each of the three letters. On cross-examination counsel for defendant sought to ex-

amine plaintiff regarding the correctness of certain items included in the account. The court sustained an objection, saying; 'There is nothing to cross-examine him about except these interviews he has testified to and these letters;' and it is urged that the right of cross-examination was thereby improperly limited, and that, in any event, the remark of the court was improper, for the reason that the jury would conclude therefrom that the only matters for determination in the case were in reference to the interviews and the letters about which plaintiff had testified. The ruling was correct. Plaintiff was not asking to recover upon the original account, but upon the alleged agreement or account stated, by which the amount due was fixed. 'In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The account is founded, not upon the original contract, but upon the promise to pay the balance ascertained.' *Throop v. Sherwood,* 4 Gilman 92.

"Plaintiff had testified only in reference to the interviews, resulting, as he said, in an agreement fixing the sum due, and in relation to the letters, and the cross-examination was properly confined to the same matters. The remark of the court was a terse and accurate statement of the law applicable to the situation, and could have had no prejudicial effect with the jury, because the defendant was afterwards permitted to offer evidence showing the condition of the accounts between the parties on his theory of the case."

III.

THE GIST OF THE ACTION IS THE AGREEMENT TO OR ACQUIESCENCE IN THE CORRECTNESS OF THE ACCOUNT. PLAINTIFF DID NOT NEED TO SHOW THE NATURE OF THE ORIGINAL TRANSACTION.

In *Hale v. Hale,* 86 N. W. 652 (14 S. D. 644), an action upon an account stated, the court said (p. 651):

"As a recovery did not depend upon the various items of indebtedness arising from former transactions, but upon the agreement of the parties subsequently made, and which constitutes an account stated, the court very properly rejected testimony relating to the original subject-matter, and the assignments of error relating thereto are without merit."

In *Jacksonville M. & P. Ry., Etc. Co. v. Warriner,* 16 So. 898, (35 Fla. 197), the court said, in speaking of the evidence as to an account stated, (p. 899):

"It is not necessary in proving an account stated, the gist of which consists in the agreement to or acquiesence in the correctness of the account by the other party, to first show the books of original entry from which the account agreed upon by the parties was made up. The very object in rendering, stating, and settling accounts is to avoid the necessity of making such proof."

Dick v. Zimmerman (supra).

IV.

THE COURT ERRED IN ADMITTING CERTAIN EVIDENCE, HEREAFTER PARTICULARLY REFERRED TO, ELICITED FROM THE WITNESS GOLDSTEIN ON CROSS-EXAMINATION.

S. L. Goldstein was called as a witness on behalf of the plaintiff in error, and, on his direct examination, testified to the folloiwng facts:

That he was treasurer of the plaintiff in error corporation and that, as such treasurer, it was his duty to

forward to customers any large overdue statements, together with a personal letter; that there was in 1908 a custom of the plaintiff in error of keeping carbon copies of all correspondence, and that Plaintiff's Exhibit No. 1 is a carbon copy of the original letter signed by him and sent to C. H. Lilly & Company at Seattle, Washington; that plaintiff in error also had a custom of keeping carbon copies of all statements sent out, and that Plaintiff's Exhibit No. 2 is a carbon copy of the original statement sent to C. H. Lilly & Co., Seattle, Washington; that since the mailing of the account to C. H. Lilly & Company, no payment on the account has been made. (Trans. p 71-75).

On cross-examination of the witness, the defendant was permitted to ask the following questions:

"Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?" (Trans. p. 79).

"Then, is that the case with each item of merchandise on that statement?" (Trans. p. 79).

"Then your statement that the goods did not belong to C. H. Lilly & Company, but were stored until paid for by them, is that or is that not correct?" (Trans. p. 80).

"None of the merchandise items, then, on this statement is the property of Lilly & Company?" (Trans. p. 80).

"Stored how, as security for the payments for the account?" (Trans. p. 81).

"Or as Lilly & Company's property?" (Trans. p. 81).

"Where were the goods stored?" (Trans. p. 81).

"Kindly state which warehouse." (Trans. p. 82).

"Kindly state in which warehouse and the location thereof." (Trans. p. 82).

"How do you know whether they are stored at all anywhere?" (Trans. p. 84).

"Does your book show in what warehouse these particular goods you have been testifying about are stored?" (Trans. p. 84).

"Does the statement on the books with which you compared this statement, as you have testified to hitherto, show where these goods are stored?" (Trans. p. 85).

"Kindly give the location of the two warehouses in San Francisco." (Trans. p. 86.)

"Kindly state the names, number and plan of your various warehouses." (Trans. 85.)

"Have you ever seen these goods in person?" (Trans-p. 86).

"Then are you—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement—Plaintiff's Exhibit No. 2--the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?" (Trans. p. 88).

"In answering this last question, you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of the California Fruit Canners' Association and stored with all their other goods?" (Trans. p. 88).

The plaintiff objected to all of these questions on the ground that they were not proper cross-examination, and it is now most earnestly contended that the action of the trial court in overruling these objections was error.

It will be noticed that the testimony of this witness on direct examination was strictly limited to the identificaton of the correspondence passing between the parties, which it is claimed constitutes the account stated, and to the question of payment. Yet the defendant was permitted to cross-examine the witness in detail as to the transactions on which the account is based; namely, as to the title in the goods, whether the goods were actually in warehouse, what warehouse they were stored in, and the method of storage—matters not even remotely connected with any fact or circumstance elicited on direct examination.

V.

CROSS-EXAMINATION MUST BE STRICTLY CONFINED TO FACTS AND CIRCUMSTANCES CONNECTED WITH MATTERS UPON WHICH THE WITNESS HAS TESTIFIED IN HIS DIRECT EXAMINATION.

This rule is now firmly established in the Federal Courts and has the support of practically all state courts and text book writers. It was first announced as a Fed-

eral rule of evidence by Justice Story in rendering the opinion of the court in the *Philadelphia & Trenton Railroad Company v. Stimpson*, 10 Peters 448, at p. 461:

"Upon the broader principle, now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."

A similar doctrine is announced in *Houghton v. Jones*, 17 L. Ed., where the court says (p. 505):

"It appears that the subscribing witness to the deed introduced was present in court during the trial, and was examined with reference to certain matters, but not touching the execution of the deed. The defendant thereupon claimed the right to cross-examine him with reference to such execution. The court held that the defendant must, for that purpose, call the witness, and could not properly make the inquiry upon the cross-examination. In this particular the ruling of the court below was correct. The rule has been long settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters he must do so by calling the witness to the stand in the subsequent progress of the cause."

The reason of the rule and the reasoning upon which it is based are very fully and forcibly set forth in *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 Federal 668, in the following manner (p. 674):

"In the courts of the United States the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct ex-

amination, and a voilation of this rght s reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him in his own behalf. (Citing numerous authorities.)

The reason of the rule is that a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines him. *Wilson v. Wagar,* 26 Mich. 457, 458; *Campau v. Dewey,* 9 Mich. 417, 418. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject concerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not inquire. If the cross-examiner would investigate these subjects by the testimony of the witness, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the Federal Courts the line of demarcation which limits a rightful cross-examination is clear and well-defined, and it rests upon the reason to which attention has been called. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands the sponsor for the truth of his testimony, while without that line he does not. It does not vary, at the discretion of the court, with any convenience or necessity of court or counsel, because no conveniences or necessity can be conceived of which would not enable the cross-examiner to make the witness his own, and because to subject the rule to the discretion of the court or counsel is to abrogate it."

The numerous authorities cited in this case show plainly the general acceptance of this rule, and, in addition to the cases there cited, we desire to call the attention of the court to the following authorities and the numerous cases cited by them as clearly supporting the doctrine:

Jones on Evidence, Sec. 820.
Enc. of Evidence, Vol. 3, p. 822.
Wills v. Russell, 25 L. Ed., 608.
McKnight v. United States, 122 Fed. 926.
Bertleson v. Hoffman, 77 Pac. (Wash.) 801.
Ashborne v. Town of Waterbury, 37 Atl. (Conn.) 498.
Stone v. White, 450 So. (Florida) 1032.
Tourelotte v. Brown, 29 Pac. (Colo.) 130.

The attention of the court is directed to the fact that not only were the questions objected to not germane to any matter brought out on direct examination, but they were particularly vicious in that they were directed to what, if properly pleaded, would have constituted an affirmative defense; namely, that there was no consideration for the payment of the account because the title to the goods had never passed to the defendant. To this state of facts, the rule above set forth is particularly applicable. *Jones on Evidence*, p. 1039:

"This rule clearly applies when the attempt is made to draw out, by cross-examination, facts having no connection with the matters stated in the direct examina-

tion, but constituting the *substantive defense or claim of the cross-examiner.* For example, if the direct examination of the payee of a note is confined to the question of the genuineness of the signature or the identity of the note, the adverse party has no right to cross-examine as to the consideration; and in ejectment, the plaintiff's witnesses cannot, on cross-examination, be examined as to the defendant's title. So in an action on a guardian's bond, when the plaintiff's witness does not testify upon the subject, he cannot be cross-examined to show that the bond was not duly executed."

The case of *McCrea v. Parsons,* 112 Fed. 917, is very similar to the case at bar. That was an action on an account stated, brought by the partnership of E. M. Parsons & Sons to recover the sum of $9,476.50. The defendants pleaded the general issue and three special defenses, all substantially to the effect that the transactions upon which the account was based were illegal and void as gaming contracts. The following is from the opinion of the court (p. 919):

"At the trial E. M. Parsons, one of the plaintiffs, called as a witness for the plaintiffs, identified the stated account upon which suit was brought, and said that he received it from the defendants at the time stated. It was thereupon admitted by the defendant McCrea that the account was drawn from the defendants' books and sent by them through the mail to the plaintiffs about April 1, 1899. The direct examination of the witness was confined to the identification of this account. Upon cross-examination he was asked: 'What was the nature of these transactions? Did you ever intend any delivery?' The question was objected to, and the objection sustained, and, we think, correctly. The question was not then proper. A cross-examination should be confined to the subject of the examination in chief. The question went to the defense of illegality of the

transaction, which was an affirmative defense. The witness was not recalled by the defense. The question was not proper upon cross-examination."

In *Braly v. Henry*, 77 Cal. 324, on an action on a promissory note, it was held that where the witness had given no evidence on his direct examination relating to the consideration for the note, it is not proper cross-examination to ask him questions for the purpose of showing that the note was without consideration.

Another case which, by reason of analogous facts, very closely resembles the case at bar is *Youmans v. Carney*, 23 N. W. (Wis.) 20. The facts and the ruling of the court are set forth in the opinion (p. 20):

"The payee of the note was examined as a witness in behalf of the plaintiff. After she had testified, in effect, that the defendant had executed the note: that she had written the body of the note at her mother's house, and then dated it in the defendant's office, at the same time he signed it, she was asked, on cross-examination, this question: 'How came you to write up a note for a thousand dollars? Answer. It was given by him in settlement of a suit.' The plaintiff's counsel objected, in effect, that he had simply proven the signature to the note, but had given no evidence of the consideration therefore except *prima facie* evidence furnished by the note itself, and that theb urden was on the defendant to contradict such evidence, or show the want of it. The court then stated: 'I do noth think it is proper now. That is a matter of defense.' The defendant's counsel then remarked: 'I apprehend we are at liberty to go into the whole *res gestae*.' To this the court responded, in effect, that it was not necessary for the plaintiff's case toprove the consideration of the note, and that it was improper for the defendant then to go

into that question. To this the defendant excepted, and this ruling is the principal error assigned.

It will be observed that the proposed line of cross-examination was excluded on the ground that it was not only a matter of defense but also improper cross-examination. On her direct examination the witness had given no testimony as to the consideration of the note, and had not, therefore, laid the foundation for being cross-examined on that subject. The plaintiff, relying upon his *prima facie* case made by the introduction of the note and proof of signature, had left the question of consideration, or rather the want of it, as a matter of defense. The defendant could not go into his defense until the plaintiff had rested.

The proposed line of cross-examination did not relate to anything that might have occurred at the time of writing or signing the note, and hence did not pertain to the *res gestae* as suggested by counsel. The only ground upon which the proposed line of cross-examination could possibly have been permissible was by way of discrediting the testimony which had been given by the witness as to the genuineness of the defendant's signature."

The contention that the court erred in allowing the defendant in error to introduce an affirmative defense by cross-examination of the plaintiff's witness as to facts and circumstances not germane to any matter touched upon in the direct examination is supported by the Supreme Court of California in *Haines v. Snedigar,* 110 Cal. 18, a case on all fours with the case now before this court. The complaint in that case was in the ordinary form upon a promissory note. The answer admitted the making of the note, and, as an affirmative defense, pleaded in substance that the note was given

as part payment of a harvester purchased by defendant and warranted to do good work; that thereafter a contract in writing was entered into between the parties, by the terms of which the payment of the note was conditioned upon the vendor putting the harvester in good working order; that the vendor did not put the harvester in order to do good work.

At the trial, plaintiffs' counsel called upon G. W. Haines, one of the plaintiffs, who presented a promissory note and said it belonged to plaintiffs and was signed by defendant, and who also testified that no part of the note had been paid. Against the objection of the plaintiffs, the defendant was allowed to prove by the witness that the written agreement, alleged in the answer, had been entered into by the parties and was allowed, over the objection of the plaintiffs, to introduce the written agreement in evidence. The plaintiffs there rested, and the defendant moved for a nonsuit, that it was shown by the written agreement that the plaintiffs were under a duty to make the machine do good and satisfactory work, and that no evidence to this effect had been introduced. The motion was granted and judgment of nonsuit entered.

The court held this to be reversible error, saying (p. 21):

"The action of the court in admitting the evidence objected to and in granting the nonsuit was excepted to,

and the rulings thereon are assigned as error. We think the court erred in its rulings. The defense set up by the defendant involved the plea of an entirely new and distinct contract, made subsequent to the contract upon which the action was based. It was a plea by way of confession and avoidance, involving new matter to be proven by the defendant. Its allegations are, under our code, to be treated as though denied.

The entire answer is made up of affirmative matter. Whatever was necessary to be alleged therein devolved upon the defendant to prove. But he could not by any recognized rule of procedure offer such proofs until plaintiffs had made their case and submitted it to the court. Plaintiffs called one of their number as a witness. He testified to no single thing that was not admitted by the pleadings, but he was a witness, and as such defendant was entitled to cross-examine him. The limit placed upon cross-examination is so largely within the discretion of the trial court that its action in allowing a wide range to questons upon cross-examination will only be reversed in extreme cases.

The court might, in its discretion, as is often done, permit the defendant to prove by plaintiff's witness when on the stand, the due execution of an agreement important to his defense. This course, treated as a mere matter of convenience, was not open to serious objection. To permit this agreement to be then admitted in evidence was, however, quite a different matter.

It was in effect to inject into the case of the plaintiffs a portion of the defense, and was subversive of known and fixed rules of procedure and violative of the whole theory upon which those rules are founded. The proof of the execution of the written agreement of August 6, 1892, was not proper in cross-examination. and its admission in evidence was error.

Greenleaf, in his work on Evidence, Volume 1, Section 447, after discussing the difficulty of laying down a precise rule in reference to the limit to be placed upon

cross-examination, adds: "A party, however, who has not opened his own case will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party, though after opening it he may recall them for that purpose.' "

In *Borden v. Lynch,* 87 Pac. (Mont.) 609, the court states the rule in the following language (p. 610):

"The plaintiff, being sworn as a witness, identified the mortgage and note, stated that she was the owner of them and that the defendant had not deposited the amount of the note with the county treasurer for her nor paid the same to her. On cross-examination she was asked for what consideration the note and mortgage had been given. Upon objection of her counsel, on the ground that it was not proper cross-examination, she was not permitted to answer. Being a party and having offered herself as a witness, the defendant insisted that he had a right to cross-examinate her as to all the circumstances connected with the execution of the note and mortgage, including the consideration. The general rule in this country is that a witness may be cross-examined as to anything testified to him in chief or connected therewith, but not as to other matters. *Code Civ. Proc.,* Sec. 3376; 3 *Jones on Evidence,* Sec. 820; *Kipp v. Silverman,* 25 Mont. 296, 64 Pac. 884; *Braly v. Henry,* 77 Cal. 324, 19 Pac. 529; *McFadden v. Mitchell,* 61 Cal 148; *Youmans v. Carney,* 2 Wis. 580, 23 N. W. 20; *Bell v. Prewitt,* 62 Ill. 361, *Houghton v. Jones,* 63 U. S. 702, 17 L. Ed. 503. While the rule should be extended rather than restricted in its application, it may not be extended to include matters clearly not connected with the subject-matter upon which examination in chief was held. The plaintiff having been asked only as to whether she was the owner of the note and mortgage, it was not proper on cross-examination to go into questions of consideration or other circumstances connected with the transaction which resulted in their execution, either on the ground that such matters were part of the *res gestae,* or that they were connected with matters deposed to in chief."

The Supreme Court of South Dakota, in *First National Bank of Pierre v. Smith,* 65 N. W. 439, states (p. 439):

"The error referred to was the ruling of the court in sustaining respondent's objectoin to the following question propounded to witness DeLaney on cross-examination: 'Q. If it was put there as a credit on deposit, how long was it before your credit was exhausted in the bank? This was objected to as incompetent, etc., and not proper cross-examination. The objection was sustained, and, we think, properly so. The witness was called by the plaintiff (respondent) simply to prove the signature of the defendants to the note, and the signature of the firm of 'DeLaney Bros.' to the indorsement upon the note. No other questions were propounded to him. The defendants' (appellants') counsel then proceeded to cross-examine the witness as to the consideration received, etc., for the note, and one of these questions was the one now under consideration. The evidence sought to be elicited by the cross-examination was as to a matter pleaded as an affirmative defense to the action, and was not cross-examination of any matter testified to by the witness on his examination in chief. No rule is better settled than that a defendant cannot, on cross-examination, introduce his own affirmative defense, unless the witness has, in his direct examination, been interrogated as to the matters concernng which he is cross-examined. In this case counsel for plaintiff (respondent) had examined the witness as to the signatures only, and no question was asked touching the matter of consideration. Clearly, the defendant had no right, on cross-examination, to go into their affirmative defense. *Wendt v. Railway Co.,* 4 S. D. 476, 57 N. W. 226."

See also *Beans v. Denny,* 117 N. W. (Iowa) 1091.

See also the opinions of the Court in *Dick vs. Zimmersan,* 69 N. E. (Ill.) 754, hereinabove set forth.

The courts of a few states have refused to sanction the rule above set forth, which is known as the "American" or "Federal" rule, and have adopted the "English" or "Orthodox" rule that a witness may be cross-examined on any matter material to issues in the case regardless of the limits of his direct examination; but even in the states where this latter rule has been adopted, the trial court will not be allowed to take the case from the jury where the plaintiff has made a *prima facie* case because of evidence of an affirmative defense not germane to the subject of direct examination elicited on cross-examination of plaintiff's witnesses.

This is illustrated by the opinion of the Supreme Court of Missouri, which has adopted the "Orthodox" rule in the case of *Ayers vs. Wabash Railway Co.*, 88 S. W. (Mo.) 608, where the court says (p. 609):

"In such case, if the plaintiff had by other evidence made out a *prima facie* case, the court could not take it from the jury on account of testimony brought out by defendant in the examination of the plaintiff's witness touching matters that had not been referred to in the direct examination. Such testimony would be the same, in effect, as if the witness had, as in conformity with the federal rule, come down from the stand, and been recalled by the defendant after the plaintiff had closed his case."

VI.

THIS ERROR IN THE ADMISSION OF EVIDENCE WAS PREJUDICIAL TO PLAINTIFF IN ERROR AND SHOULD WORK REVERSAL OF THE JUDGMENT.

The evidence of the plaintiff in error was closely confined to the necessities of the case, viz: That an account had been rendered to the defendant in error and that he had acquiesced therein.

That this evidence established a *prima facie* case we have already shown by the citation of abundant authority, and there is no pretense here that, in ruling on the motion for non-suit, the court decided otherwise.

By the allowance of cross-examination of the witness Goldstein upon matters in no way touched upon in the direct examination, the defendant in error was allowed to show what, if properly pleaded, would have amounted to an affirmative defense.

Briefly summarized, this evidence is as follows: That the goods covered by the different items of the account belong to the plaintiff in error, and were stored in its warehouse until payment was made by defendant in error; that such goods were not the property of the defendant in error until paid for, but were stored for account of the defendant in error until payment was made; that the plaintiff in error had a number of warehouses in the State of California, and that the witness did not know in which particular warehouse the goods in question were stored; that the witness could not tell whether or not the book with which the statement had compared would show the warehouse in which the goods were stored; that the witness could not say

whether or not he had ever seen the particular goods in question, because all goods of the plaintiff in error were stacked in its warehouses, thousands of cans together, and left in that way until orders came in, when the goods were labelled, cased and shipped; that the goods in question were never segregated and stored separately as the goods of plaintiff in error, but were left in stacks; that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of plaintiff in error and were stored in stacks with other goods (Trans., pp. 79-89).

That it was on this evidence, and this evidence alone, that the court granted the motion for non-suit clearly appears both from the text of the motion and from the oral opinion of the court in support of the order granting the motion.

The motion was made on two grounds:

FIRST—That no obligation was shown upon which the account stated could rest; that there was no consideration or prior transaction back of the account.

SECOND—That the promise to pay the account was conditioned upon the goods being in the warehouse to the order of defendant in error, and that there was no evidence to show that the goods were in the warehouse to his order (Trans., p. 49).

As we have hereinbefore pointed out, it was in no way incumbent on plaintiff in error to go behind the new

obligation implied from the statement of account and show that the account was based on a binding prior transaction, that being a matter of affirmative defense.

Therefore, had the court strictly confined its ruling on the motion for non-suit to the grounds presented in support of such motion, it must have denied the motion for the reason that it was not necessary that the plaintiff in error show any of the facts which it is claimed were not shown.

The second ground for the motion, in addition to being subject to the vice pointed out, is also objectionable as being entirely without foundation in the eivdence, and, we think, may be safely dismissed without further consideration. There is not a single utterance in the opinion of the trial court that would induce the belief that the order granting the motion for non-suit was the result of a failure on the part of the plaintiff in error to prove a material part of its case; but, on the contrary, it clearly and plainly appears that such ruling was based upon the affirmative showing of lack of consideration made by defendant in error on cross-examination of the witness Goldstein.

The full text of the oral opinion of the trial court rendered in granting the motion for non-suit is as follows (Trans. pp. 49, 50, 51):

"An action brought on an account stated is undoubtedly a proper action to bring, and it is an action that has

grown out of the experience of business men, who find that when partners have adjusted their accounts and dismissed matters from their memory, that the balance then ascertained to be due, one way or the other, should thereafter be treated as a definite thing, and they need not take the trouble thereafter to go through again the settlement or adjustment that they have once made.

"Now, the law provides that an account of that kind shall have a definite effect and be considered the basis of a new promise, with the proviso that either party may surcharge it or falsify it by showing that it was the result of fraud or a serious mistake.

"Now, the question in this case is, and the only question there is before the court, is there sufficient evidence here upon which the jury, if the case were to close right now, could find a verdict for the plaintiff which the Court would permit to stand? I do not think there is.

"This account, or this statement of account, which was sent by plaintiff to defendant, is the ordinary method or disclosed the ordinary method of stating an account for goods sold and delivered. It says 'to merchandise,' and then followed by several items of storage. Now, the uncontroverted evidence here shows that no sale of merchandise ever took place. The parties, both parties, probably thought that what was done amounted to a sale —at least the plaintiff thought so. The defendant thought a sale had taken place, and his letter upon which the adjustment of account really is based, speaks of the goods being held or carried in warehouse—being 'held in warehouse for us.'

"Now, it is plain, under the authorities, that the property in these ogods never passed to the defendant, consequently no action for goods sold and delivered could be maintained.

"Now, could this action be maintained, or could the case be submitted to the jury on the theory suggested by the Court a few minutes ago, that the parties may have

expressly stipulated that the goods were to remain the property of the plaintiff and were to remain in the general mass of the plaintiff's property until the defendant called for them. Now, that would be an extraordinary contract. I am not clear whether the principles of an account stated could apply to an executory contract or series of executory contracts.

"Assuming that the principles might so apply, this would be the result: I do not think that stating the account, that is, striking a balance, would change the nature of the undertaking between the parties. If there were executory contracts the plaintiff could not recover the purchase price without going through the formality, at least, of tendering the goods. It is true the circumstances might be such that a tender would take place by merely segregating the goods from the general mass in the plaintiff's own warehouse, but there would have to be something in the nature of a tender, some endeavor to pass the property to the buyer before an action could be maintained for the purchase price.

"So it seems to me that even if the principles of an executory contract apply to an account stated that the plaintiff has not shown a liability. Undoubtedly the plaintiff may maintain an action, if it has contracts, and I assume that it has, and if they have been violated by the defendant the plaintiff may maintain an action for such violation; but on the basis of an account stated it seems to me that the proof has negatived the liability asserted for the reasons that I have already stated.

"The motion for a non-suit will therefore be granted."

The keynote to the opinion of the court is found in this sentence: *"Now, the uncontroverted evidence here shows that no sale of merchandise ever took place."* The theory of the court must have been that, inasmuch as the title in the goods had never passed to the defendant

in error, the action on the account stated must fail, for the reason that it was shown that there was no consideration for the statement of such account. No other conclusion is possible from the language employed in the opinion. Now "the uncontroverted evidence" upon which the trial court relies to support this theory is the evidence of the witness Goldstein, given on cross-examination in answer to the questions objected to by plaintiff in error. That it is on this evidence alone clearly appears, for there is not a single word of other evidence in the transcript, uncontroverted or otherwise, which in any way relates to the transactions anterior to the statement of account except this same evidence of the witness Goldstein.

Thus the trial court not only admitted evidence which was improper, but it went further and based its ruling on the motion for non-suit on that very evidence. The admission of this evidence was, therefore, in the highest degree prejudicial and injurious to plaintiff in error; and for the error committed in so admitting it, this court should grant a new trial.

While the Appellate Courts are always disposed to concede something to the discretion of the trial court in the question of the latitude to be allowed on cross-examination, they have uniformly held that, where evidence improperly admitted on cross-examination works serious injury to the opposite party, a new trial will be granted.

The case of *Haines vs. Snedigar,* 110 Cal. 18, referred to above is in point. In that case, as in the one now before this court, the trial court allowed evidence of an affirmative defense on cross-examination and, basing its evidence on the ruling so admitted, granted a nonsuit to defendant. This the Supreme Court of California held was reversible error.

In *O'Connell vs. Pennsylvania Co.,* 118 Fed. 989, the Circuit Court of Appeals, Sixth Circuit, in considering the question of whether or not a new trial should be granted because of the error here complained of, said, per Lurton, Circuit Judge, (p. 991):

"All this was objected to by the plaintiff in error as not legitimate cross-examination, but evidence in chief. It was, however, admitted, over objection, as proper cross-examination. This statement as to the condition of the step on the car examined by the witness was plainly evidence in chief. The witness should have been recalled if the defendant so desired, and thus made the witness of the defendant as to the condition of the step of the car he had identified by number and name as the car from which plaintiff fell."

Citing—

Montgomery v. Insurance Co., 97 Fed. 913; 38 C. C. A. 553, 557.

Willis v. Russell, 100 U. S. 621, 625; 25 L. ed. 607.

Houghton v. Jones, 1 Wall. 702, 706; 17 L. ed. 503.

"The cases cited above are all cases where the trial court had properly applied the rule limiting the cross-examinationg to the matters opened up by the examina-

tion in chief, and in *Willis v. Russell*, the court calls attention to the fact 'that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury.' 'Cases,' said the court, 'not infrequently arise where the convenience of the witness, or the court, or the party producing the witness will be promoted by a relaxation of the rule to enable the witness to be discharged from further attendance; and if the court, in such a case, should refuse to enforce the rule, it clearly would not be ground of error, unless it appeared that it worked serious injury to the opposite party.' While we are dispased to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross-examination and in respect to the order in which evidence is to be introduced, yet we must reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary. In the instance before us the case turned upon the question as to whether the plaintiff's injury was due proximately to a defective appliance. Without having asked the witness Forney a single question in respect to this matter, the defendant was permitted to affirmatively show that no such defect existed as that claimed by the plaintiff. A consequence was that, upon this very affirmative evidence, the defendant, at the close of plaintiff's evidence, asked and obtained a direction to find for the defendant in error. This verdict was directed, as is shown by the charge of the court, upon the ground that this positive evidence, delivered by Forney, that the step was not defective, was not so contradicted by the evidence of other witnesses as to make a case for the jury. We are not prepared to say that in this particular instance the suspension of the usual and proper rule in regard to the limits of a cross-examination did not operate to the very serious injury of the plaintiff's case. Certain it is that no reason appears which appealed to the discretion of the tral judge. Inasmuch, however, as the case must be

reversed upon other grounds, we reserve the question as to whether the action of the court in this instance would, independent of any other ground, be reversible error."

In *Bowsher v. Chicago, B. & Q. R. Co.*, 84 N. W. (Iowa) 958, the action was brought to recover for damages sustained by plaintiff by reason of his wrongful ejectment from one of the defendant's trains. Plaintiff had failed to procure a ticket, and, on the demand of the defendant's conductor for the payment of ten cents additional to the usual fare, refused to pay the same, stating to the conductor the reasons why he had not procured a ticket. Notwithstanding these reasons, he was ejected from the train and brought this suit, and, on trial of the action, recovered a verdict of $405.00.

The judgment was reversed on appeal, and, as appears from the opinion of the court, the reason of this reversal was the improper admission of evidence injurious to the defendant on cross-examination.

"The conductor was called and examined by the defendant, and on cross-examination was asked if he had not, in the year 1897, carried J. H. McVey from Bethany Junction to Lamoni at least 25 times, to which defendant's objection as immaterial and not proper cross-examination was overruled. The witness answered, 'I don't think I have carried him that many times without his paying train fare.' He was asked if he had ever demanded 10 cents extra from W. H. Spurrer prior to March 9, 1897, which was objected to for the same reason, the objection overruled, and the witness answered to the effect that he always demanded the 10 cents extra, unless the company was to blame for the passengers not having a ticket. This evidence was not as to any matter called

out on the examination of this witness in chief, and was, therefore, not proper cross-examination. We think the objections should have been sustained. See *Sherman v. Railroad Co.*, 40 Iowa, 45; *Stone v. Railroad,* 47 Iowa, 83. The same is true as to the cross-examination of this witness as to one Bradley having been injured by passing under the gang plank used in transferring mail and baggage. This evidence was manifestly prejudicial to the appellant.''

A careful examination of this case discloses the fact that, although numerous errors were assigned, the error in the admission of evidence on cross-examination was the only one upheld by the Appellate Court and that, on this ground alone, a new trial was granted.

It is respectfully submitted to this court that the evidence herein complained of was improperly admitted, that it clearly appears that the ruling of the trial court granting the motion for non-suit was based exclusively on this evidence, that the admission of such evidence was, therefore, manifestly prejudicial and injurious to the plaintiff in error, and that this court should, consequently, grant a new trial.

Further, the defendant, by seeking to recover, in his counterclaim, damages for fraud and breach of warranty under the original contract for the sale of goods, had affirmed that contract as an executed contract.

The defendant's answer to the amended complaint consideration of which and rely upon such representations on part of plaintiff with intent to cheat and de-

fraud defendant, as to quantity and quality of goods stored in warehouses subject to defendant's order, in consideration of which no relying upon such representations defendant agreed to pay the value of said goods; that thereafter defendant discovered the falsity and untruthfulness of plaintiff's representations known by plaintiff to be false and untrue; that plaintiff confessed to defendant that the goods were not of the grade or quality represented to defendant and agreed to remedy the defect and reimburse defendant for any damages or injury caused defendant by reason of such deficiency in quality; and that plaintiff failed to keep said agreement. (Record, pp. 24 and 25; Par. III, IV, and V of Answer.)

The defendant's answer to amended complaint alleges in its second defense and counterclaim all of the allegations contained in its first affirmative defense and further alleges that defendant before discovering the goods were not up to quality received and paid plaintiff for a large quantity of said goods and sold and distributed the same to his customers representing to the customers that the goods were of the grade and quality as represented by plaintiff to defendant.

That thereafter and *subsequent to the rendition of the account by the plaintiff to defendant* AS CLAIMED BY PLAINTIFF, said goods were by his customers repudiated and in many instances returned to defendant; that defendant's customers refused to pay for the same

and that in consequence thereof and by reason of deficiency of grade and quality of said commodities the business of defendant had been damaged in the sum of $25,000, in which amount defendant prayed judgment against plaintiff. (Record, pp. 26, 27; Par. III, IV, V and VI of 2d Defense in Answer.)

The defendant alleged not only fraudulent representations on the part of plaintiff, inducing defendant to agree to pay for the goods in the original contract for sale, but a breach of warranty of the contract as an executed contract and damages sustained by the fraud and breach of warranty.

On this state of facts defendant had a choice of remedies, either to rescind the original contract for the sale of the goods, restore what he had received thereunder and recover back what he had paid or to affirm the contract, recover damages sustained for fraud alleged and those alleged as resulting from breach of warranty.

A vendee who has been induced by fraud of his vendor to make a contract of purchase, which contains warranties made by the vendor, has a choice of remedies. He may rescind the contract, restore what he has received and recover back what he has paid, or he may affirm the contract, recover the damages he has sustained for the fraud, and also those resulting from a breach of the warranties, but he cannot do both.

Wilson v. New U. S. Cattle Ranch Co., 73 Fed. 994, 8th C. C. A.

"The difference between the two actions is not merely technical; in substance they are as far apart as affirmance and repudiation."

Cheney v. Dickinson, 172 Fed. 109, at 111 7th C. C. A.

Citing *Wilson v. Cattle Ranch Co. supra.*

Peters v. Bain, 133 U. S. 670.

In framing his counterclaim defendant elected to affirm the contract and recover damages for fraud and breach of warranty; and in laying his cause of action for damages for breach of warranty alleged that he had received and paid for a large quantity of the goods. Having thus alleged the original contract for sale and executed contract as a basis for his counter claim for damages he should not have been allowed to attempt to show by improper cross-examination of plaintiff's witness Goldstein that the original contract for sale had remained an executory contract and that no sale of the goods and no passing of title from plaintiff to defendant had ever taken place under that contract.

Notwithstanding the testimony of Goldstein, adduced on cross-examination over plaintiff's objection, whatever that testimony was, it should not have been available to defendant as showing the original contract for sale unexecuted, in view of the allegations of defend-

ant's pleading that the contract was an executed one and in the absence of any attempt to amend that pleading subsequent to defendant's discovery through such testimony (if there were such discovery) that defendant was mistaken, the contract had never become an executed one and defendant had not received and paid for a large quantity of the goods as he had alleged.

It may be contended that plaintiff was not prejudiced by the admission, at the trial, of the testimony of Goldstein on cross-examination objected to by plaintiff as plaintiff had abundant time between the taking of the depositions and the trial of the cause to recall Goldstein or call other witnesses, to correct any error in, or contravert, that testimony so objected to.

But there is no force to such contention because plaintiff could not be required to anticipate that the defendant would seek to rely upon testimony it had brought out from plaintiff's witness which contradicted and disproved the allegations of defendant's counter claim as to the original contract being an executed contract; which defendant must prove to recover damages alleged; on the contrary, plaintiff had a right to rely upon defendant offering evidence in support of his counter claim.

VII.

THERE IS YET ANOTHER REASON WHY THE TRIAL COURT WAS IN ERROR IN CONSIDERING

THE EVIDENCE COMPLAINED OF IN DETERMINING THE MOTION FOR NONSUIT, AND THAT REASON IS FOUND IN THE WELL ESTABLISHED RULE—

EVIDENCE, ALTHOUGH NOT OBJECTED TO, SHOULD BE DISREGARDED WHERE IT IS ADDRESSED TO NO ISSUE IN THE CASE.

The rule that there must be no variations between the pleadings and the proof applies equally to matters pleaded in defense and matters constituting the affirmative cause of action. The pleadings in the case at bar consisted of:

FIRST: The complaint, which alleged an action on an account stated in the ordinary form.

SECOND: The answer, which

(a) Denied generally the allegations of the complaint;

(b) set up the affirmative defense that the statement of the account had been induced by fraud on the part of the plaintiff in error.

THIRD: The reply, which denied the allegations contained in the affirmative defense of the answer.

An answer to a complaint on an account stated, setting up a general denial, puts in issue only the rendition of the account by the plaintiff and the acquiescence there-

in by the defendant. Any matter, such as omission, fraud or mistake, which would have the effect of impeaching the account, is an affirmative defense and must be specially pleaded. Authorities fully supporting this contention are cited in a prior part of this brief.

The only issues, therefore, on which evidence was competent, were:

FIRST: Was an account stated between the parties; and,

SECOND: Was the statement of the account induced by fraud on the part of the plaintiff in error? The evidence given by the witness Goldstein on cross-examination, which was objected to as not proper cross-examination and which has been previously summarized in this brief, was addressed to neither of these issues, but was manifestly adduced for the purpose of showing that no sale of goods had ever taken place; or, in other words, that the account was stated by the parties under a mistake as in the legal effect of the anterior transactions between the parties. There is no doubt that an account started may be impeached for mistake, but it is equally clear that to avail himself of such defense, the defendant must specially plead such mistake.

The answer in the case at bar apprises the plaintiff in error that the defendant in error would attack the statement of account on the ground of fraud, but con-

tains no allegation to inform the plaintiff in error, as it was entitled to be informed, that any attempt would be made to impeach the account for mistake. The evidence addressed to the issue of mistake was incompetent, and, although not objected to on the ground of its materiality, should have been disregarded by the trial court as not addressed to any issue in the case.

In

Texas & Pacific Railway Co. v. Johnson, 34 S. W. (Texas) 186,

an action was brought by an employee of the defendant to recover for personal injuries occasioned by the negligence of another employee of the defendant. The defendant set up certain acts of contributor ynegligence, and, on the trial of the case, introduced evidence of such negligence, and, in addition thereto, introduced evidence of an action of contributory negligence not pleaded, namely, the failure of the plaintiff to enter the time of departure of his train in the office of the train dispatcher. The court, in holding that this proof could not be considered in determining the question of contributory negligence, says (P. 191):

"The record shows that a rule of the defendant company required all conductors leaving Ft. Worth to register, in a book kept for the purpose in the train dispatcher's office, the time of their departure, and it was proven that the plaintiff, Johnson, failed to enter the time when he went out with his train; and defendant company contends, in its briefs, that this failure was contributory

negligence on the part of plaintiff. A charge was asked by defendant on the subject, to the effect that if he failed to register the time of his departure, and in so doing he did not exercise the care of a man of ordinary prudence, under the circumstances, and such failure contributed to proximately and directly to the production of his injuries that, but for such failure he would not have been hurt, the defendant would not be liable. This charge was refused by the court, and, I think, properly, because the defendant had (not) pleaded specially the contributory negligence of the plaintiff. The only acts of contributory negligence set up were in the plaintiff's failing to send back a flagman when he stopped his train to take water, and in failing to put out torpedoes on the track, as was required by the rules of the company; and his failure to register was not pleaded as an act contributing to his injury, and therefore was not an issue before the jury. The fact that the evidence was admitted, without objection, to prove the failure to register, did not supply the want of an allegation to support such proof."

Jewett et al., Commissioners, v. Sweet, 52 N. E. (Ill.) 962,

was a bill in chancery for injunction, restraining the appellants in their official capacity as commissioners of highways from cuttng a certain ditch and waterway through a highway and turnpike road upon which the farm of the appellee abuts. The bill sets out facts showing that the proposed change would irreparably injure his lands. The commissioners, in their answer, do not claim that the proposed change was necessary or that the construction of a bridge, which it was proposed to build over the waterway, would benefit the public or that the present bridge was in any way defective. In refusing to consider evidence introduced at the hearing on these points, the court said (P. 963):

"Some attempt was made by defendants to prove that the condition of the highway was such that this bridge was needed, or that to put in the new bridge would benefit the highway. The rule that a party cannot make one case by his pleadings, and a different case by his proofs, is applicable to a defendant as well as to a complainant. The defendant is bound to apprise the complainant, by his answer, of the nature of the case he intends to set up, and cannot avail himself of any matter of defense not stated in his answer, even though it appears in evidence.

Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232.

By filing an answer, the defendant submits to the court the case made by the pleadings.

Kaufman v. Wiener, 169 Ill. 596, 48 N. E. 479; *Holmes v. Dole,* Clarke, Ch. 71.

As the answer in this case does not assert any public necessity for the proposed bridge, nor that the highway will be improved thereby, complainant was not required to meet that defense, and defendants cannot ask a decree in their favor because of any evidence which they introduced on that subject."

Numerous other authorities in support of this rule might be cited, but the rule is so well established and its violation in the case at bar so plain that we do not believe further authority necessary.

VIII.

THE MOTION FOR A NONSUIT WAS IMPROPERLY GRANTED. THE EVIDENCE CONTAINED IN THE DEPOSITIONS OF PLAINTIFF'S WITNESSES PRIMA FACIE ESTABLISHED THE PLANTIFF'S CASE.

"A nonsuit should be denied where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations. . . . The proof must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged, and must be such that a rational mind can draw from it the conclusion that the fact exists."

Goldstone v. Merchants', etc., Co., 123 Cal. 625, 627, and cases there cited;

Freeso v. H. S. & L. Soc., 139 Cal. 392, 394;

Ferris v. Baker, 127 Cal. 520, 522;

Hercules Oil R. Co. v. Hocknell, 91 Pac. (Cal.) 341, 344.

Where different conclusions may be reasonably drawn by different minds from the same evidence the question is one for the jury.

Coprivisa v. Rilovich, 87 Pac. (Cal. App. 1st Dist.) 398.

"A nonsuit should be denied when there is any evidence tending to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence. (*Felton v. Millard*, 81 Cal. 540.)"

Zilmer v. Gerichten, 111 Cal. 73, 77;

Kramm v. Stockton El. R. R. Co., 3 Cal. App. 606, 609.

In *Estate of Arnold*, 147 Cal. 583, after stating, that the same rules apply to contests of wills as in ordinary civil cases in the matter of nonsuits, the court said (p. 586):

"Every favorable inference fairly deducible and every favorable presumption must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of the several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the conotestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." (Citing numerous cases.)

"A motion for a nonsuit admits the truth of plaintiff's evidence and every inference of fact which can be properly drawn therefrom, and the question thus presented is as strictly one of law as that which would arise, if, to a complaint alleging the same facts, a demurrer should be interposed upon the grounds that such facts were insufficient to constitute a cause of action."

Warner v. Darrow, 91 Cal. 309, 312;

Plass v. Plass, 121 Cal. 131, 136;

Wagner v. Wedell, 3 Cal. App. 274, 281.

In *Hanley v. California, etc., Co.*, 127 Cal. 232, the court en banc said (p. 237):

"The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant. (*Goldstone v. Merchants', etc., Storage Co.*, 123 Cal. 625.) This rule must be applied to all the evidence submitted by plaintiff."

Estate of Arnold, 147 Cal. 583, 590;

Wright v. Roseberry, 81 Cal. 87, 91;

Williams v. Hawley, 144 Cal. 97, 102;

Archibald Estate v. Matteson, 90 Pac. (Cal. App.) 3rd Dist.) 723, 725;

Kramm v. Stockton El. R. R. Co., 3 Cal. App. 606, 609;

Doyle v. Eschen, 89 Pac. (Cal. App., 3rd Dist.) 836, 837, and cases there cited.

"Where there is a conflict in the evidence, some of which tends to sustain the plaintiff's case a motion for a nonsut should not be granted. (*Pacific Mutual Life Ins. Co. v. Fisher,* 109 Cal. 566, 42 Pac. 154.)"

Kramm v. Stockton El. R. R. Co., 3 Cal. App. 606, 609;

Archibald Estate v. Matteson, 90 Pac. (Cal. App.) 723, 724;

Pacific Mut. Ins. Co. v. Fisher, 109 Cal. 567, 568.

"Such a motion (for a nonsuit) is in the nature of a demurrer to the evidence. The truthfulness of the testimony is admitted, but its sufficiency is challenged."

Butler v. Highland, 89 Cal. 575, 581;

Hopkins v. Railway, 34 S. W. 1029; (*passim*) 1036; s. c. 96 Tenn. 409, 437;

Doyle v. Eschen, 89 Pac. (Cal. App.) 836, 837;

Archibald Estate v. Matteson, 90 Pac. (Cal. App.) 723, 725.

In *Jones v. Adair,* 91 Pac. 78, the Supreme Court of Kansas said (pp. 78-9):

"The trial court may have discredited the testimony of the plaintiff, but the testimony offered in his behalf

could not be disbelieved and disregarded on a demurrer to the evidence. On that test every part of the testimony favorable to the plaintiff is deemed to be true, and every conclusion which it tends to prove is deemed to be admitted. *Christie v. Varnes,* 33 Kan. 317, 6 Pac. 599; *Buoy v. Milling Co.,* 68 Kan. 436, 75 Pac. 466."

The evidence introduced on the part of the plaintiff would have justified the jury in returning a verdict in its favor, and the court was, therefore, without authority to usurp the function of the jury by taking the case from them.

Holloway v. Railway Co., 130 Cal. 177, 179, 180;
Bush v. Barnett, 96 Cal. 202, 203, 205;
McCurrie v. Southern Pac. Co., 122 Cal. 558, 561-2;
Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 551-2;
Osgood v. L. A. Traction Co., 137 Cal. 280, 283.

IX.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR AN ORDER REQUIRING PLAINTIFF TO ELECT BETWEEN THE TWO CAUSES OF ACTION SET FORTH IN ITS ORIGINAL COMPLAINT.

The first cause of action in the original complaint was upon a balance due for goods, wares and merchandise sold and delivered by plaintiff to defendant; the second cause of action in that complaint was upon an account stated and an agreement in writing to pay.

These actions were not inconsistent with each other. The proof to sustain the second cause of action could consist of the proof to sustain the first cause of action together with the further proof of the stating of the account and the agreement to pay.

The proofs would be, not inconsistent, but cumulative; and no confusion could result which would prevent the jury from reaching a correct result.

The practice, pleadings and forms of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

Sec. 914, R. S. U. S.

This section applies to the rules of pleadings. Note to

Castro v. De Vriarte, 12 Fed. 250, citing:
Taylor v. Brigham, 3 Woods 377;
Lewis v. Gould, 13 Blatch. 216.

"The plaintiff may unite several causes of action in the same complaint when they all arise out of one contract, express or implied. . . ."

Sec. 4942 Ball. Washington Code.

Moylan v. Moylan, 49 Wash. 341.

The decision, upon a question of pleading in the state courts, is under the act of Congress (Sec. 914, R. S. U. S.), binding upon this court.

Taylor v. Brigham, Fed. Case 13,781.

"The sufficiency and scope of pleadings and the forms and effect of verdicts in actions at law, are matters in which the circuit courts of the United States are governed by the practice of the courts of the state in which they are held."

Glenn v. Summers, 132 U. S. 152.

The order requiring plaintiff to elect between its two causes of action was prejudicial to plaintiff.

The issues tendered by these two causes of action were distinct.

In the one on the stated account in addition to proof of the stating of the account and the agreement to pay, proof was only required of transactions of a monetary character sufficient to base an account stated upon.

In the cause for balance of an account for goods sold and delivered the proof would necessarily have to be full and complete as to such sale and delivery.

It is true that the nonsuit was granted on the remaining cause of action, on the account stated, on the ground that the evidence showed affirmatively that no sale or

delivery had taken place. But as we have argued above the evidence so showing was admitted over plaintiff's objection and under a state of pleadings when the original contract for sale was admitted as an executed one, and there was no issue between the parties on that question.

Had there been an issue raised by the pleadings as to the original contract for the sale of the goods becoming an executed contract at the date of such pleadings, the plaintiff would have been required to offer proof in support of its allegations in respect of the same.

But that such an issue would not have been raised by defendant is apparent from the allegations of the affirmative defenses and counter claim contained in defendant's answer.

When error occurs the presumption is that it is prejudicial.

In the case of *Railroad Company v. O'Brien et al*, 119 U. S. 99, the court, through Justice Harlan, say:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was admitted, it is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

And this court in *Gold Mining Co. v. Cheney*, 162 Fed. 593, at p. 600, cited approvingly *U. P. R. R. v. Field*, 137 Fed. 14, as follows:

"The presumption always is that error produces prejudice. It is only when it appears so clearly as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable." Citing a large number of cases.

X.

THE COURT ERRED IN ENTERING JUDGMENT OF DISMISSAL.

If our contentions as above set forth are correct, it necessarily follows that the court erred in entering judgment of dismissal.

We submit that, for the reasons above given, the judgment of the trial court should be reversed and the case remanded with directions to grant a new trial.

Respectfully submitted,

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No. 1863

In the United States Circuit Court of Appeals

For the Ninth Circuit.

CALIFORNIA FRUIT CANNERS' ASSOCIATION, a corporation,

Plaintiff in Error,

vs.

C. H. LILLY, doing business as C. H. LILLY & Co.,

Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Brief of Defendant in Error.

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ALASKA PRINTING CO., ALASKA BUILDING, SEATTLE

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Brief of Defendant in Error.

STATEMENT OF THE CASE.

Action upon an account stated. The instruments creating the obligation are plaintiff's exhibits 1-2-3, copied in its brief on pages 20-21-22; transcript pages 102-5. Concisely stated it is that plaintiff represented to the defendant that it had certain goods on storage in its warehouse for the defendant and that it desired the money for these goods, costs of storage and interest. Defendant, replying, promised to pay the sum and in the same letter disclosed the fact that

his promise to pay was given under a belief that the goods were actually stored for him in plaintiff's warehouse. Subsequently, upon a belief that the goods were not in the warehouse for him, never had been segregated in any manner, labeled, boxed or in fact canned, defendant failed to pay and this suit resulted.

Upon receiving the complaint which alleges an account stated in writing, the defendant demanded copies of the instruments, which were furnished. These thus became a part of the pleadings under our practice.

Plaintiff took the depositions in California of three witnesses—S. L. Goldstein, vice president, and one McMillan and Bentley. By these he identified the exhibits 1, 2 and 3; proved the sending of the exhibit 2 to the defendant and receipt of his letter, No. 3; and that no items had been paid for. He also explained some of the abbreviations on the account.

Upon cross-examination of Goldstein defendant asked as to the meaning of certain other abbreviations on the account, viz., "Mdse., W. H., a/c," and elicited from him that it was a representation to defendant that plaintiff had that merchandise in its warehouse belonging to him. The witness upon his direct examination testified that these were the representations made in writing to defendant which elicited his promise to pay, he was also asked by the

defendant questions to the general tenor as to whether those representations he himself had made were in fact true or false. This evidence was objected to as not proper cross-examination. These depositions contain all the evidence introduced. The cross-examination was not introduced until after the plaintiff had introduced the exhibits in evidence. At close of the case the defendant moved for non-suit, which was granted, and this Writ of Error subsequently sued out.

Plaintiff relies upon the following points for a reversal:

1st. An account was stated between the parties.

2d. A *prima facie* case was made when the plaintiff proved the sending of the account and defendant's acquiescence.

3rd. The gist of the action is this acquiescence in the account.

4th. Error in admitting the cross-examination referred to.

5th. This error was prejudicial and necessitates reversal.

6th. In any event this cross-examination should be disregarded because addressed to no issue.

7th. Plaintiff's evidence establishes a *prima facie* case.

8th. Error in requiring plaintiff to elect between his causes of action.

ARGUMENT.

In replying to plaintiff's contention we shall take up the points discussed by him in the above order:

I.

Do the facts disclose an account stated?

We have no quarrel with the law quoted by plaintiff hereunder on pages 22-3-4-5 of his brief. The authorities quoted announce a primary proposition well established. We are not prepared, however, to admit that they lead to the conclusion that the facts of this case disclose an account stated.

The first authority cited is 1 Am. & Eng. Enc. of Law & Practice, p. 688:

"An account stated is an agreement between parties *who have had previous transactions of a monetary character,* that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, expressed or implied, for the payment of such balance."

It thus appears from his own authority, which is abundantly supported, that one of the elements of a stated account is a "previous transaction."

In *Truman vs. Owens,* 17 Ore. 523, goods were sold to the defendant and delivered and at the same time a statement of account showing the price. No objection was made to the bill as rendered. Court held that this could not show any accounting between the parties, but what was done was a part of and in fulfillment of the original contract—a part of the original contract itself.

Powers vs. Ins. Co., 68 Vt. 390.

Quincey vs. White, 63 N. Y. 370.

Field vs. Knapp, 108 N. Y. 87.

Austin vs. Wilson, 11 N. Y. Supp. 505.

Callahan vs. O'Rourke, 45 N. Y. Supp. 764.

Stevens vs. Tuller, 4 Mich. 387.

Tams vs. Sills (Canadian) 29 U. C. Q. B. 497.

2 Greenl. Ev., Sec. 126.

In *Zaccarino vs. Pallotti,* 49 Conn. 36, the court says:

"Authorities on this subject might be cited to any extent."

Vol. 1 Am. & Eng. Enc. of Law, p. 440, lays down the same doctrine with numerous authorities.

In *Austin vs. Wilson, supra,* it is held that an account stated cannot be made the instrument *per se* to create liability.

The necessity of having prior transaction an element of a stated account is readily seen when the

philosophy creating the principle of account stated is considered. It is simply the striking of a balance between debtor and creditor. The relation of debtor and creditor must have been in existence and that liability is then merged into or rather subrogated to a new promise, based upon the prior subsisting legal liability or upon a moral obligation arising out of a legal liability.

How there can be an examination mutually of accounts and the agreement as to balance due is hard for us to see unless there have been prior transactions between the parties. And a possibility of a mutual examination, at least, is essential.

Reinhart vs. Hines, 51 Miss. 344.
Lockwood vs. Thorne, 18 N. Y. 288.
Bussy vs. Gant, 10 Hump. (Tenn.) 241.

The action of stated account was not introduced into our law for the purpose of superseding the action in assumpsit for goods, wares and merchandise sold or upon the contract to purchase.

Now it is true that in this case the defendant filed affirmative defenses, after denying account stated, setting up previous transactions concerning these goods, but the plaintiff filed a reply denying all the allegations in the affirmative defenses. So the court will take notice that the plaintiff denies the only

allegation of any prior transactions. Where, then, is the proof? The only evidence is that plaintiff said to defendant, "You owe me nineteen thousand dollars for goods of yours I have in my warehouse." Defendant says: "I'll pay you that money for the goods of mine you have in your warehouse." Clearly nothing to show any prior transactions; nothing by which any mutual examination of accounts can be made. Evidently 'tis a promise to pay conditional upon his goods being in the warehouse.

The only proof in this case of liability is the stated account itself; instead of the relation of debtor and creditor existing between the parties on the 29th day of April, 1908, the reply denies all facts from which such conclusion could be drawn. An account stated cannot *per se* be made the basis of a liability. If it could a man could telegraph your Honors that you owed him two hundred dollars for a horse of yours in his stable and if you failed to reply hold you upon an account stated.

II.

Did the plaintiff establish a prima facie case?

The question is discussed by the plaintiff under the assumption that there was no cross-examination or rather without considering it, for they admit on page 45 of their brief Goldstein's cross-examination

amounts to an affirmative defense to the action. (See paragraph 3, page 45, plaintiff's brief.) We shall also discuss this point as if the cross-examination had not taken place.

In his argument hereunder we think counsel misapprehends the issues raised by the pleadings. His complaint alleges account stated. We deny it. We plead facts showing prior transactions, and that he procured our promise to pay the $19,000 by falsely representing that he had goods of ours to that value in his warehouse. This defense he denies *in toto.* The burden is therefore upon him to prove all elements necessary to establish a stated account. His only effort is to do so by introducing his representations to us that he had goods of ours in storage upon which there was due him $19,000, and our promise to pay $19,000 for the goods in storage for us. Nothing to show that it is not a primary transaction; facts showing that there could be no mutual examinaton of accounts; facts showing that the defendant could not possibly know whether the representations were true or false; facts showing that the only promise the defendant could have made was conditional upon the goods being in the warehouse. Plaintiffs admit on page 26 that it is necessary to show prior transaction of a monetary nature but claim that the sending of exhibit No. 2 shows that. Does it? How does it

show that any more than it shows this to be the original transaction? In other words, liability can arise from an account stated *per se.* Yet the authorities are that it cannot. If this promise to pay were a negotiable note, the mere introduction of the note would make a *prima facie* case because the law would presume a consideration. But such is not this case. We rather think that an analogous case to the one at bar is this:

A telegraphs B that he has purchased for him 1000 head of cattle at $25 and asks for the $25,000. B replies he will pay it for the cattle. Can A maintain an action upon account stated? I rather think it is upon contract between them for A to purchase. He must prove the contract, the purchase and tender of cattle. The promise to pay is certainly conditional upon the fact of purchase. To hold it to be a stated account we should have to hold that B admitted that A had purchased the cattle, etc. This is something the facts show he could not have known. Hence the necessity of the law requiring previous transactions of a monetary nature. In such cases the defendant always has had an opportunity of ascertaining the correctness of the consideration passing to him for his agreement.

The Am. & Eng. Enc. of Law says that the circumstances must be such that it can be concluded that the correctness of the statements has been admitted.

III.

The Gist of the Action is the acquiescence in the account.

It is no doubt true that the gist of the action of account stated is the admission of defendant that the statements are correct. This fact does not destroy but rather lends force to the necessity for the law making previous transactions an element of such an action, for without them there is no consideration for such an admission.

IV.

Was error committed in admitting the cross-examination of S. L. Goldstein?

We claim the evidence was properly admitted:

1st. Because Goldstein had testified on his direct examination that he sent the statement to the defendant; that is that he made those representations to Lilly and it was they which elicited the defendant's promise to pay. In other words, that the consideration for the promise to pay was the truth of those statements. Having thus testified in effect as to what was the consideration for the promise sued on, we think the defendant had a right to follow on the cross. However, if we are in error in this, still we submit:

2d. That where false and fraudulent representations are alleged as an inducement to a contract, the law gives the widest latitude in both the direct and cross-examination of witnesses. The strict rules of evidence are in such cases relaxed. If we err in this contention also, still we submit:

3rd. That where the reason for a rule fails, the rule falls. And the reason for the rule contended for by plaintiff is as stated in his brief, on page 35: "But in the Federal Courts the line of demarcation which limits a rightful cross-examination is clear and well defined, and it rests upon the reason to which attention has been called." That is, "if the cross-examiner would investigate these subjects by the testimony of the witness, he may and he must make him his own witness, and stand sponsor for the truth of his statements." This is not the rule in this state so far as the evidence of the principals is concerned. Our statute after providing for the examination of the principal to an action by his opponent either upon deposition, interrogatories, or at the trial, section 1229 B. & R., 6012 Ballinger, provides that such testimony may be rebutted by adverse testimony. If, however, we are wrong in this contention, still we submit:

4th. It was proper as tending to question the veracity of the witness. He had testified that he

had made the statements to the defendant and if they were not true it would at least tend to discredit his veracity in the minds of the jury. If, however, we are in error in this contention, still we submit:

5th. That there is no conflict between the authorities cited by counsel on this point on pages 34 to 44 of his brief, and the ruling of the court. And that wherever they meet the facts in this case they hold that it was proper cross-examination.

The case of *Dick vs. Zimmerman,* 207 Ill. 636, is the case nearest in point and is quoted at length on page 28 of plaintiff's brief. This was an action upon an account stated. Plaintiff testified that at request of defendant he had submitted to him an account of their past dealings; had had several interviews concerning the matters; letters had passed between them and that after an examination the defendant had conceded it to be correct and promised to pay it. Upon cross-examination the defendant attempted to go into the separate items of account. The Supreme Court held he *might properly cross-examine concerning the interviews and letters* that brought about the stated account but not go into the separate items. That is our case. The witness testified, "I wrote this letter and enclosed this account." (Exhibit 2.) Now we did not question him as to what items of merchandise composed the account,

nor as to the cost of the items, nor anything concerning the items that made up the account. We did, however, ask him about the representations he made to the defendant. Surely the law is the same if the representations be made in writing as it is if they be made in interviews. Suppose he had sent him the account showing the items and another writing saying we hold these goods in storage for you? These statements that the goods are in storage are not the items of the account. They are the same as the interviews that brought about the stated account in the Dick case, and under that authority are proper subjects of cross-examination after witness had testified that he had made them.

Counsel for plaintiff consumes ten pages in quoting authorities all to the effect that in a suit upon a promissory note, where the witness swears as to the signature and ownership of the note, that he cannot be cross-examined as to the consideration. This is so well-established as to be fundamental and Judge Donworth never held to the contrary. It is not applicable to this case at all.

The only two cases not upon notes are the Dick case, *supra,* which we claim is in our favor, and the case of *McCrea vs. Parsons,* 112 Federal 917. This case is easily distinguishable from the case at bar. In that case the cross-examiner endeavored to open

up the separate items that composed the account. There was no evidence concerning any representations being made as an inducement to the promise to pay or acquiescence in its correctness. Neither did the cross-examination concern any representation. In this case at bar, we reiterate that we never attempted to touch upon the items that compose the account. If the account was stated those items are dead—they are settled by the promise to pay. For instance, the exhibit No. 2 has, "Nov 1, Mdse., W. H., a/c $6000." We never asked as to what Mdse., as to the separate price, as to how much, as to quality, etc. Not at all. We never touched upon the items. He testified, however, on his direct, that he sent that exhibit to the defendant and that answering it the defendant promised to pay.

Now that exhibit contains some other information from the witness to the defendants extraneous to the items, viz., "W. H., a/c." What does it mean? He testifies in effect it means he told the defendant thereby that the goods were all in plaintiff's warehouse in storage for defendant. It is the same as statements made in the interviews and letters referred to in the Dick case, *supra*. It is not an item of the account. It is a representation which witness said he sent the defendant and having so opened the door for us we were entitled to enter.

V.

If the admission of the cross-examination was error, was it prejudicial?

We respectfully submit that even conceding the cross examination to be erroneous, its admission at that time was in no way prejudicial, for the following reasons:

1. Under our statute as we have cited above we could have made this man our witness and not have been bound by his testimony. If therefore the court had sustained the objection on the ground that it was not a proper cross-examination, we should have asked leave to make him our witness at that time and have propounded the same question to him. We could readily have done so because even had its answers been to the opposite effect to what they are now we could have rebutted such evidence and would not have been bound by it. However the answers were given in depositions, and had the court sustained the objection as not a proper cross-examination, then we should have offered the cross-examination as our direct evidence which we have a right to do in this state. Thus it will be seen that to have sustained the objection would not have availed the plaintiff in any manner.

2. It is self-evident that to reverse the case for this reason would be futile, because under the law of

this state, not being bound by the witness's testimony, upon the re-trial we would make him our witness and he would necessarily be compelled to testify to the same fact, and counsel has admitted that this testimony is fatal to their case. Thus a reversal would be merely the encroachment upon the time of the court without the possibility of it aiding the plaintiff.

VI.

Was this cross-examination directed to any issue in the case?

When counsel makes the contention that the evidence should be disregarded in any event because immaterial to the issues, it seems to us that such position conflicts with his main contention. In one position he contends that the admission of evidence was erroneous and prejudicial to his rights so as to require a reversal, and now he assumes the position that it is not material evidence. We consider it directly within the issues. Counsel's argument is that it would be within the issues had we plead a mistake in agreeing to the act. There is a vital difference in our opinion between a mistake and a fraud. Had we plead a mistake, we doubt whether the evidence would be admissible, because in our estimation it shows a fraud rather than a mistake. To illustrate:

If I stay in-doors and some one comes in today and in talking to me tells me that it has rained and then tomorrow I meet a friend and in our talk I state to him that it rained yesterday, it is a mere mistake upon my part, provided the statement is not true. If, however, instead of being confined, I was out in the open and thus knew that it did not rain and with such knowledge state that it did rain, such statement cannot be called a mistake. It is a direct falsehood and if by stating it I gained a pecuniary advantage, such pecuniary advantage is gained through a fraud and not through a mistake. So the evidence shows in this case.

The plaintiff secured our promise upon the representation that goods were in storage, necessarily knowing that the statement was false and this evidence shows that it was false. If such is the case, then the effect of the statement being to secure a pecuniary advantage is in the eyes of the law a fraud and not a mere mistake.

VII.

Did the plaintiff's evidence establish a prima facie case?

This question, we have heretofore argued, our contention being:

1. That it does not in law show a stated account.

2. That the cross-examination being proper it was fatal to plaintiff's recovery even if the exhibit introduced established a stated account.

VIII.

Was the order requiring the plaintiff to elect between his causes of action error?

Counsel's argument in this behalf seems to be dependent entirely upon the local statute; and again that the law of this locality will control in the Federal Court. We guess there is no question about the fact that the local law will be enforced in this case. That there is any local statute, however, authorizing a party to sue for goods, wares and merchandise sold, and in the same suit, as another cause of action, to sue upon an account stated for the same transaction, we do deny most emphatically. The statute quoted will allow a plaintiff bringing a suit against a defendant upon a contract to settle all of the differences between the same parties which may arise also upon contract. Each cause of action, however, must at the time of bringing the complaint be in existence. As we understand, a stated account and liability for goods sold, like the causes of action first sued on, cannot be in existence at the same time. Where goods

are sold and an accounting is had between the parties concerning it, and the balance is struck and admitted, the latter becomes a stated account and the first dies; it is no longer in existence. It seems absurd to say that the stated account can exist and at the same time the liability for the goods, wares and merchandise sold. The only consideration that the stated account can possibly have is the prior liability, and if the stated account exists the prior liability must have ceased to exist—must have become merged, as it were, into the liability under a stated account. For instance, if counsel's contention in this regard is true, then, if I should go to the plaintiff and purchase $19,000.00 worth of goods and should afterwards give my note for the purchase money, they could sue me for goods, wares and merchandise sold $19,000.00 and upon the promissory note for $19,000.00. Yet it is self-evident that if the action for merchandise sold exists, then there is no liability under the note. And if the liability under the note exists, the liability for merchandise sold has ceased to exist. In other words, our contention in this regard is that for every cause of action sued on in a complaint the separate causes of action must be founded upon distinct liabilities. The plaintiff will not be allowed to go fishing for a judgment. And in this case it might be well to remark that it was admitted before Judge Hanford when the motion was argued that the stated ac-

count grew out of and was the same transaction as the first cause of action.

Another idea that we would bring to the minds of the court in this regard is the fact that if the court will consider what would have doubtless occurred on the trial under such a complaint it would readily see that the defendant would be placed in a peculiar predicament. For instance, if we should offer evidence to show that the goods were not of the quality, or that the right price was not charged, the plaintiff would object upon the ground that it was immaterial, because there was a stated account, and if there was a stated account it precluded us from inquiring into those matters. Again, if we had directed our defense towards showing that there was no stated account, the plaintiff could contend that he could still recover under the first count. In other words, the result would be that the court would necessarily have to instruct the jury that if they should find that there was a stated account, then all the evidence concerning the quality, kind, price, etc., of the goods would be absolutely immaterial, and if they should find that there was no stated account, then they might find for the plaintiff upon the first count. In other words, he would, in effect, say to the jury that the plaintiff considers that he has a right of action against the defendant and he has plead all the causes of action

which he thinks will make the defendant liable, and that if one does not exist they have a right to say that the other does. In short, that a litigant may go fishing.

Our statute simply means that if I purchase goods from the defendant for $100.00, giving them my note for that amount and again purchase more goods and give them another note in payment for the second purchase, and again become indebted to them on open account and pay them nothing, then in one suit they may sue me upon the three causes of action. First cause, upon the first note. Second cause, upon the second note; and third cause, for the open account. Thus all of the liabilities are independent, separate and distinct.

We respectfully submit that neither the statute of our state nor of any other state permits a party to sue upon the same liability in several different causes of action.

Another point that we desire to call the court's attention to is that in any event the plaintiff was not injured by this ruling, because to recover upon the open account he would also have been compelled to show delivery of the goods, which is contrary to the fact.

In conclusion, we respectfully submit that the rulings of the court were in all respects proper, and that, in any event, it would be a mere waste of time to order a new trial, for under no theory of the case can the plaintiff recover.

J. H. ALLEN,
Attorney for Plaintiff in Error.

43-45 Maynard Building,
Seattle, Wash.

No. 1863

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION (a corporation),
Plaintiff, Plaintiff in Error,

vs.

C. H. LILLY, doing business as C. H. Lilly & Co.,
Defendant, Defendant in Error.

Petition for a Rehearing on Behalf of Plaintiff in Error.

WILLIAM THOMAS,
ROBERT N. FRICK,
LOUIS S. BEEDY,
JAMES LANAGAN,
Attorneys for Plaintiff in Error and Petitioner.

Filed this.....day of March, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 1863

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION (a corporation),
Plaintiff, Plaintiff in Error,

vs.

C. H. LILLY, doing business as C. H. Lilly & Co.,
Defendant, Defendant in Error.

Petition for a Rehearing on Behalf of Plaintiff in Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The plaintiff in error respectfully submits that a rehearing of the above entitled matter be granted for the following reasons:

This court has placed its refusal to reverse the judgment on two grounds:

1st. That it was not reversible error to allow the witness Goldstein to be cross-examined on matters

pertaining to the subject of the direct examination for the latitude to be allowed on cross-examination is to be determined by the trial court in the exercise of its sound discretion.

2nd: That no substantial injury to the plaintiff resulted from the allowance of such cross-examination.

1st. It is said in the opinion:

"But whatever may be said of the reasons on "which the rule is ordinarily upheld, there is no "substantial reason why, in the exercise of sound "discretion, the court may not relax the rule in the "case of the cross-examination of a party to the "action. Here was a witness who was the vice-"president and treasurer of the plaintiff, and its "active agent in its transactions with the defend-"ant. To all intents and purposes he was the "plaintiff. He was introduced as a witness to tes-"tify as to his own acts. He was sworn to testify "to the whole truth. He produced in evidence the "statement of account which he had sent to the "defendant, together with the answer of the de-"fendant thereto, which, on its face, was an assent "to the statement and an acknowledgment of the "debt. He testified that no payment had been made "on the account or on the items of storage therein "specified. In presenting those papers he vouched "for their truth and he thereby asserted that the "goods had been sold and delivered as represented

" in the statement. He was examined in such a " way as to have him avoid testifying to the import- " ant facts which went to the merit of the contro- " versy, facts which were peculiarly within his " knowledge. In such a case, why should the de- " fendant be required to make the plaintiff a wit- " ness for the defense and be compelled to give " credit to the plaintiff's testimony as to the very " existence of his own cause of action?"

We do not believe, from the above, that we have made clear the nature of our objection to the allowance of the cross-examination. The objection of the plaintiff in error to the testimony as not proper cross-examination is not based alone on the fact that this testimony of Goldstein's was not reached in an orderly manner, or introduced at the proper time, or upon any reason relating to method or form merely. It goes deeper than that. The evidence was without the issues and should not have been received at any time or in any form. The only issues made by the pleadings are made by the allegations of the complaint that an account was stated, the denial in the answer of the statement of the account, and the affirmative defense contained in the answer, to the effect that the agreement to pay for the goods was induced by fraudulent representations. The evidence given by Goldstein on cross-examination was addressed to the question of whether title to the goods had passed to the purchaser, and as no issue was made on that point, it was not

material or competent. It was for this reason that the direct examination was closely confined to the proof of the allegations of the complaint, and there was no intention to examine the witness "in such a " way as to have him avoid testifying to the import- " ant facts which went to the merit of the contro- " versy". We believe that the defendant was justified in assuming that evidence of whether or not the sale had been completed was immaterial and incompetent and would not be allowed, for plaintiff was not informed by the answer that the defendant intended to rely on such defense, and could not reasonably be expected to foresee the introduction of such evidence.

It seems clear that in an action on account stated, the general denial puts in issue only the rendition of the account and the acquiescence therein by the defendant, and that any matter such as omission, fraud or mistake is an affirmative defense, and must be specially pleaded. If the defendant intended to rest his defense on the ground that when he had agreed to the statement of the account, he was acting under a mistaken belief as to the legal effect of the transactions had between the parties anterior to the statement of the account, he should have so alleged in his answer, that the plaintiff might have been prepared to meet the issue on trial. The learned court, in that part of the opinion quoted above, has assumed that the evidence adduced on cross-examination was material, and being material, the

method by which or the time at which it was introduced should properly be left to the discretion of the trial court, but as we have pointed out, the evidence was not material, and there was no opportunity for the exercise of discretion on the part of the trial court.

2nd. The court says, further in its opinion:

"But even if the witness Goldstein is not to be "deemed, technically speaking, the actual plaintiff "in the action, it is clear that the admission of his "testimony on the cross-examination was not error "for which the judgment should be reversed, for "the plaintiff was not injured thereby. *The de-* "*fendant could have called the witness in his own* "*behalf and could have elicited the same testimony* "*in his defense, Lukens v. Hazlett,* 37 Minn. 44. In "*Wallace v. Russell,* 100 U. S. 621, it was held that "where it appears that no injury has resulted to the "plaintiff in error, a judgment will not be reversed "merely because the court at the trial permitted a "witness on his cross-examination to be interro- "gated as to *matters pertinent to the issue,* but "about which he had not testified in chief."

It seems to us that the sentence ~~understood~~ in italics is the keynote to the opinion; this court taking the view that a new trial can be of no avail to plaintiff, because the evidence objected to will be introduced at some stage of the trial, and when so introduced will be absolutely fatal to plaintiff's case. But our contention is, that while the defendant could have called

the witness in his own behalf, he could *not* have elicited the same testimony; the reason, we have pointed out above. The testimony adduced was inadmissible under the pleadings. In

Wallace v. Russell, 100 U. S. 621,

the court says, as is stated in the opinion, that the judgment will not be reversed where no material injury has resulted to the plaintiff, because the trial court permitted the cross-examination of a witness on matters to which he had not testified in chief, but which "were pertinent to the issue", but in the case at bar, the evidence was not pertinent to the issue, and for that reason it seems to us that the admission of the evidence resulted in a very serious injury to plaintiff, and that a new trial should be granted. That facts do exist that would constitute a defense, if properly pleaded, to the cause of action stated in the complaint, can be no ground for refusing a new trial, for the defendant has waived such defense by failing to plead it. If the case is sent back for a new trial, the evidence elicited on cross-examination and on which the judgment of nonsuit was rendered, cannot be received either on cross or direct examination. We, therefore, respectfully request that a rehearing may be granted.

WILLIAM THOMAS,
ROBERT N. FRICK,
LOUIS S. BEEDY,
JAMES LANAGAN,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF ATTORNEY.

I, one of the attorneys for plaintiff in error and petitioner, hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

WILLIAM THOMAS,
Attorney for Plaintiff in Error and Petitioner.

No. 1864

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOHN S. SEATTER,

Petitioner,

vs.

THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NO. 1,

Respondent.

Petition for Writ of Certiorari to the District Court of the United States, District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1864

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOHN S. SEATTER,

Petitioner,

vs.

THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NO. 1,

Respondent.

Petition for Writ of Certiorari to the District Court of the United States, District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed withir brackets.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. SEATTER

vs.

THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE.

Petition for Writ of Certiorari.

And now comes the petitioner and respectfully represents:

I.

That heretofore, to wit, on or about the 9th day of February, 1905, there was filed in said District Court a complaint, in words and figures as follows, to wit:

Complaint [in Evergreen Cemetery Assn., etc., vs. Seatter].

In the United States District Court for the District of Alaska, Division No. 1.

THE EVERGREEN CEMETERY ASSOCIATION, an Association Having Corporate Powers,

Plaintiff,

vs.

JOHN S. SEATTER,

Defendant.

Comes now the said plaintiff, and complains of said defendant, and for cause of action alleges:

I.

That said, the Evergreen Cemetery Association,

plaintiff herein, is an association duly organized and existing under and by virtue of the provisions of the Code of the District of Alaska, having corporate powers.

II.

That heretofore, to wit, about the middle of April, 1891, the Evergreen Cemetery Association, an association of citizens of the United States and of the town of Juneau and vicinity, in the District of Alaska, was organized for the purpose of providing a burial place for the dead of said town and vicinity, and did about said month of April locate and claim for cemetery purposes and enter into the possession of that certain piece or parcel of land about three-quarters of a mile from the townsite of Juneau, in a northwesterly direction, more particularly bounded and described as follows, to wit:

Beginning at the southwest corner of what is known as the Evergreen Cemetery, from which U. S. Monument No. 3 bears S. 29 deg. 16″ W. 439 feet; thence north 56 deg. 00″ east 525 feet to the northwest corner of said cemetery; thence south 74 deg. 32″ east 512 feet, to the most northerly corner thereof; thence south 44 deg. 15″ east 264 feet to the northeast corner of said cemetery; thence south 56 deg. 00″ west 788 feet to the southeast corner thereof; thence north 4 deg. 15″ west 660 feet to the place of beginning, and ever since grantor and this plaintiff have been in possession and entitled to the possession thereof, except as herein alleged.

III.

That thereafter, and in the month of May, 1891,

said association caused said ground to be surveyed, and during said year expended large sums of money in clearing and fencing the same, and building bridges and a road for the convenient approach thereto. That ever since said time said cemetery was used and claimed by said Evergreen Cemetery Association for cemetery purposes until the same was conveyed to this plaintiff, as hereinafter mentioned, since which time said plaintiff has been using the same as a burial place for the dead.

IV.

That heretofore, by certain mesne conveyances, the land described in paragraph II hereof has been conveyed to the Evergreen Cemetery Association, the plaintiff herein, which association is composed of citizens of the United States of said Juneau and vicinity, in the District of Alaska.

V.

That said plaintiff claims the right to occupy and possess said premises and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of the citizens of the United States and of said Juneau, Alaska, for the occupation and possession of squatters' rights, and by the actual prior possession of all of said property located upon the public domain of the United States for cemetery purposes.

VI.

That on or about the 19th day of August, 1895, the said defendant wrongfully entered upon a parcel of said claim, to wit: the part of said cemetery, which is intersected by the exterior lines of survey Lot No.

307, known as the Initial and Lower Juneau Mountain Lode Claims, as is shown by plat marked "Exhibit A," filed on the 13th day of January, 1905, in the United States Land Office, at Juneau, Alaska, with the adverse claim of said plaintiff, against the entry of said Seatter for patent; said ground so intersected being described by metes and bounds as follows, to wit:

Commencing at the southwest corner of said cemetery on line 2-3, survey No. 307, thence south 66 deg. 00″ east 60 feet from corner No. 3 of said survey No. 307; thence north 56 deg. 15″ west 340 feet to the place of beginning, and that defendant has ever since hitherto wrongfully withheld the possession of said parcel of said cemetery from the plaintiff to its damage in the sum of five hundred dollars.

VII.

That heretofore, to wit, in the year 1897, and claiming a renewal on the 14th day of November, 1904, said defendant filed his application in the United States Land Office now located at Juneau, Alaska, in the District belonging to which said ground is situated, for a patent for his said pretended Initial placer mining claim, initial and lower Juneau mountain lode claims, and that afterwards and during the sixty days' publication required by law, said plaintiff filed its adverse claim in said land office.

VIII.

That this suit is brought in support of said adverse claim, and that plaintiff necessarily disbursed, expended and paid out the sum of twenty-five ($25.00) dollars for plats, abstracts and copies of papers filed

in said land office with his said adverse claim, and also a reasonable fee, to wit, one hundred dollars for the expense and preparing of said adverse claim.

IX.

That all of said ground hereinbefore described is non-mineral ground and of no value whatever for placer mining purposes, and is fit for agriculture or cemetery purposes.

Wherefore said plaintiff prays judgment against defendant—

1. For the recovery and possession of said parcel of said cemetery;

2. For the sum of five hundred ($500.00) dollars damages;

3. For the sum of one hundred and twenty-five ($125.00) dollars spent in support of said adverse claim;

4. For costs of suit.

Then follows the supplemental complaint as follows:

Supplemental Complaint [in Evergreen Cemetery Assn., etc., vs. Seatter].

"In the District Court for the District of Alaska, at Juneau, Division No. 1.

No. 404.

C. W. YOUNG, B. M. BEHRENDS, JOHN G. HEID, JOHN OLDS, and R. P. NEOSON, Trustees of the EVERGREEN CEMETERY ASSOCIATION,

Plaintiff,

vs.

JOHN S. SEATTER,

Defendant.

Upon leave first had and obtained from this court, come now the above-named plaintiff and file this their supplemental complaint in this action, alleging facts material to plaintiff's cause, occurring after the filing of the original complaint, herein, constitutes plaintiff's cause of action.

That since the commencement of this action, and after the filing of the protest and adverse claim of plaintiff against the application of defendant, in the said United States Land Office, for a United States Patent for the "Initial" placer claim, and the "Initial" and Lower Juneau Mountain lode mining claims, and in said complaint alleged, the "Department of the Interior" of the Government of the United States, by and through its Secretary of the Interior, the Hon. E. A. Hitchcock, determined in favor of said plaintiffs, protestant and adverse

claimants, the contest initiated in said U. S. Land Office, at Juneau, Alaska, upon an appeal taken by said defendant to the Secretary of the Interior from the decision of said U. S. Land Office, at Juneau, Alaska, and which said ruling and decision and determination of said contest and adverse proceeding, made and entered by said Secretary of the Interior, in favor of said plaintiffs, and against said defendant, is in words and figures as follows, to wit:

"DEPARTMENT OF THE INTERIOR.

Washington, Feb. 15th, 1907.

36—106.

C. F. SHELDON et al.,

vs.

JOHN S. SEATTER.

The Commissioner of the General Land Office.

Sir: November 14, 1904, after various proceedings not necessary to be herein set forth, John S. Seatter filed in the local land office at Juneau, Alaska, an application for patent to the Initial Placer claim, and the Initial and Lower Juneau Mountain lode claims (amended survey No. 307), situated a short distance from the town of Juneau.

Against this application separate protests were, on January 13, 1905, filed by C. F. Sheldon and the Evergreen Cemetery Association of Juneau, in each of which protests it is charged, amongst other things, that the land applied for is non-mineral in character. Hearing was had on these protests, commencing May 11, 1905, at which testimony was submitted on behalf of the protestants and the protestees; December 15, 1905, the local officers, who during the course of

the hearing had made a personal inspection of the land, found in substance and effect that the land is not mineral in character within the meaning of the mining laws, and for that reason recommended that the application be rejected. On appeal by the applicant your office by decision of August 8, 1906, affirmed the action of the local officers and held the application for rejection. The applicant again appeals. The Department has carefully examined and considered the testimony on the case, and is of the opinion that same shows that the land does not contain mineral in such quantities as to render it more valuable for mining than for agricultural purposes (for which latter purposes it appears to have been used exclusively by the applicant for about six years next preceding the date of the hearing), and hence is not subject to disposition under the mining laws. The decision appealed from is therefore affirmed.

II.

That the decision of said Department of the Interior by and through its Secretary, as aforesaid, is res adjudicata, and binding upon this court.

Wherefore, plaintiff prays judgment against the said defendant as originally prayed for in the original complaint herein.

HEID & LOVE,
Attorneys for Plaintiff.

Duly verified as was the original complaint.

X.

That thereupon the defendant in said action, petitioner herein answered, denying the allegations of plaintiff's complaint in said action, and setting up

as a defence, first, that the said District Court was without jurisdiction to try said cause, and second, that since the said ruling of the Secretary of the Interior the defendant therein, petitioner herein had made a discovery of rock in places bearing quartz *place bearing quartz* of such value that would justify a reasonable man in expending money thereon.

That on or about April, 1910, the said District Court entered judgment against the defendant in said action, the petitioner herein, awarding the possession of said premises to the plaintiff in said suit and allowing a judgment for costs therein in favor of said plaintiff and against this petitioner, as such defendant.

XI.

That petitioner is informed and believes, and so alleges the fact to be, that the said District Court is a court of limited jurisdiction, limited by the constitution and the laws of Alaska.

XII.

That from the prayer of the complaint in said action the said action is an action of ejectment, and from the said supplemental complaint the said plaintiffs are protestants, and from the judgment of said court the said judgment is a judgment of ejectment, and that nowhere in the laws or by the laws of Alaska or by the constitution of the United States is a protestant given any rights in any court of the United States, and nowhere in said laws or by said constitution is any court of the United States given any jurisdiction to render a judgment of ejectment in favor of a protestant and against a mineral claim-

ant. To adjudicate all rights of a protestant belongs exclusively to the U. S. Land Office.

Wherefore petitioner prays:

Ist.

That a writ may issue directed to the District Court of the United States in and for the District of Alaska, Divison No. 1, directing said Court to send up the record in said cause of "Evergreen Cemetery Association vs. John S. Seatter," for the inspection of this Honorable Court;

II.

That the said judgment of said District Court may be declared void;

III.

That petitioner may have such other and further relief as to this Honorable Court may seem meet and equitable.

E. M. BARNES,
Attorney for Petitioner.

United States of America,
District of Alaska,—ss.

I, John S. Seatter, being first duly sworn according to law, depose and say: I am the petitioner above named; I have read the foregoing petition and know the contents thereof, that the same is true of my own knowledge except as to the matters and things therein stated on information and belief, and as to those matters and things I believe it to be true.

JOHN S. SEATTER.

Subscribed and sworn to before me June 6th, 1910.

[Seal] GUY McNAUGHTON,
Notary Public for Alaska.

[Endorsed]: No. ——. Circuit Court of Appeals, 9th Circuit. John S. Seatter vs. Dist. Court, Dist. of Alaska, Div. No. 1. Petition for Writ of Certiorari. E. M. Barnes, Atty. for Petitioner.

[Endorsed]: No. 1864. United States Circuit Court of Appeals for the Ninth Circuit. John S. Seatter, Petitioner, vs. The District Court for the District of Alaska, Division No. 1, Respondent. Original. Petition for Writ of Certiorari to the District Court of the United States, District of Alaska, Division No. 1.

Filed June 14, 1910.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN S. SEATTER vs. DISTRICT COURT, DISTRICT OF ALASKA, DIVISION NO. 1.	NO. 1864

PLAINTIFF'S BRIEF ON WRIT OF CERTIOARI.

STATEMENT

This is an action for a writ of certiorari. The defendant rendered a judgment of ejectment against this plaintiff in said District Court, District of Alaska, Division No. 1, at Juneau, Alaska. The plaintiff in said District Court was the Evergreen Cemetery Association, a protestant in the United States Land Office, at Juneau, Alaska, against this plaintiff, who was a mineral claimant, seeking title to mineral land.

On filing the protest in the land office above named said protestant became plaintiff and this plaintiff was defendant in said above named district court.

The plaintiff here, defendant there, asks for a dismissal of said cause because said district court had no jurisdiction to hear the said action, whereupon said Evergreen Cemetery Association asked leave to file a supplemental complaint which was granted. The supplemental complaint consisted of a decision of the Secretary of the Interior on said protest. Later on the said District court entered up a judgment of ejectment, in favor of C. W Young, B. M. Behrends, John G. Heid, John Olds and R. P. Nelson, trustees of the Evergreen Cemetery Association against this plaintiff, the defendant therein, not appearing.

ERRORS RELIED ON

A protestant has no standing in court in matters pertaining to mineral land, arising from controversies in the land office. All matters in the land office are stayed until the courts adjudication has been handed down and in these are the only cases in which the courts of Alaska have jurisdiction to act. The complaint did not state facts sufficient to constitute a cause of action. Hence the court has no jurisdiction to enter said judgment of ejectment.

ARGUMENT

A protestant has no standing in court

Morrison's Mining Rights, page 285 and authorities:

"Where courts have jurisdiction the proceedings in land office are stayed."

United States Rev. Statute 2326:

"If the petitioner presents such a case in his petition that on a demurrer the court would render a

judgment in his favor, it is undoubted jurisdiction."

Gregnors Lessee vs. Astor, 6 *Pet.* 109.
Shrivers Leesee vs. Lynch, 2 *How.* 43.
Elliott vs. Pierson, 1 *Pet.* 340.
Alabama Conference vs. Price, 42 *Ala.* 49.
Carter vs. Waugh, 42 *Ala.* 452.
Satcher vs. Satcher, administrator, 41 *Ala.* 26.
Cooper vs. Sunderland, 3 *Iowa* 114.
Fraser vs. Steenrod, 7 *Iowa* 339.
Long vs. Burnett, 13 *Iowa* 28.
Morrow vs. Mead, 4 *Iowa* 77.
Moore vs. Neil, 39 *Ill.* 256.
Torrance vs. Torrance, 53 *Penn. St.* 505.
Sheldon vs. Newton, 3 *Ohio St.* 495.
Stokes vs. Middleton, 4 *Dutch* 32.
Gerard vs. Johnson, 12 *Ind.* 606.
Nede vs. Edmont, 4 *Ind.* 468.
Jackson vs. Robinson, 4 *Wend.* 437.
Finch vs. Edmondson, 9 *Texas* 504.

In a legal action plaintiff can only obtain the relief he prays for. The complaint therefor is judged by the prayer. ~~A suit on an adverse claim is an equitable proceeding. An action for ejectment is a legal action. Facts stated to support one cause are not facts sufficient to give relief in the other.~~ The prayer in this complaint shows conclusively the action in the trial court was an action of ejectment.

RECORD P

Two elements are absolutely necessary in an action of ejectment—possession by plaintiff and ouster

by defendant--nowhere does plaintiff allege either possession in themselves or ouster by defendant.

Allegation V of their complaint alleges: "That said plaintiff claims the right to occupy and possess said premises and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of the citizens of the United States and said Juneau, Alaska, for the occupation and possession of squatter's rights and by the actual prior possession of all of said property located upon the public domain of the United States for cemetery purposes.

RECORD P

I presume it is understood in every place, except Juneau, that Congress has the sole disposal of the land in all territories and districts of the United States. Plaintiffs don't allege possession, they only allege that "they claim the right to occupy." Nowhere is an ouster alleged. Par. VII of their complaint alleges the plaintiffs filing application for patent to mineral land.

RECORD P

Par. VIII of their complaint is as follows. "That this suit is brought in support of said adverse claim." Who ever heard of ~~a suit~~ for ~~adverse~~ claiming possession of the premises or a writ of ejectment issue in ~~a suit~~ for ~~adverse~~—a legal remedy in an ~~equitable suit~~? An adverse is to decide the right as to who is entitled to ~~purchase~~ between two mineral claimants.

The prayer of their complaint is: "For the recovery and possession of said parcel of said cemetery—

for Five Hundred dollars damages." Is that the prayer of an ~~adverse~~, or is that the relief an ~~adverse~~ claimant is entitled to? They do not ask for general relief, they treated the case as an action at law, the court treated it as an action at law, and on a ruling of this honorable court, in a case from Fairbanks, it held as a case was classed in the court below so it would be classed in this honorable court. I forget the citation, but that is the substance of the decision. Then this is an action of ejectment. Now, let us look at the supplemental complaint:

"Department of the Interior, Washington, Feb. 15, 1907.

"C. F. Shelton, et al

vs.

John F. Seatter.

The Commissioner of the General Land Office,

Sir:

Nov. 14, 1904 x x x x John S. Seatter filed in local land office at Juneau, an application for patent for mineral placer on lower Juneau mountain lode claim. x x x

Against this patent application, several protests were filed by C. F. Shelton, and the Evergreen Cemetery Association in which protests were charged among other things the land was non-mineral in character. x x x This department is of the opinion that the land does not contain mineral in such quantities as to render it more valuable for mining than for agricultural purposes. x x "

F. S. HITCHCOCK, Secretary.

RECORD P

Going back to allegation This protest is what this action of ejectment is brought in support of. They claim no rights in their protest—not even they are in possession, simply as any citizen has the right. They protest against the issuance of a patent.

They do not profess to have any standing, except as a protestant and the law is, a protestant has no standing in court. But why take up the time of the court in this? The complaint does not state facts sufficient to constitute a cause of action. A demurrer would lie almost any way it was worded against this complaint.

Nowhere by any law is the District Court of Alaska given jurisdiction to enter a judgment of ejectment in favor of a protestant against a mineral claimant. This plaintiff as defendant below set up in his answer in his first affirmative defense: "That this court is without jurisdiction to hear or determine this cause of action alleged to be set out in plaintiff's complaint," and also set up a discovery since the hearing named in plaintiffs complaint.

The trial court would not countenance holding the decision of the land office that on Nov. 14, 1904 the land was non-mineral was not res adjudicata, and though this plaintiff on Nov. 15, 1904, should by going a foot deeper uncover a gravel bed so rich that a cleanup must be made each evening and all the riffles of sixteen boxes filled with gold dust and nuggets worth nineteen dollars per ounce, nevertheless he

could not plead it and the government never could obtain the $2.50 per acre for the mineral ground it was, but must give it to some homesteader for nothing, if any of them would ask for it and these protestants set up no right to it. Clothing that secretary of the interior with X Rays, looking into the bowels of the earth and saying never and from henceforth will any mineral come from this land. No mineral claimant can ever set up a right to it.

With this the law in Alaska, is it surprising the Honorable Secretary is loath to give up his job? He and the Honorable Judge were at one time ~~cronies~~.

Mr. Lindley will have to go to school again if that is the law. Every lawyer, entitled to charge a fee for an opinion on mining law, knows that every decision of the land office from Alpha to Omega, says those decisions of the land office are not of effect beyond the day of the hearing in the local land office. When the trial court made the ruling above referred to, I was reminded of a criminal case I once had in California before a justice of the peace named Chas. Ziegler. The statutes then permitted a change of venue, when a justice was prejudiced and the number of changes of venue were not limited. This case came to Charley on a change of venue. Another affidavit and another motion to change was made before him. Charley wanted to try the case—wanted to find the defendant guilty, wanted to sentence him. He knew the affidavit which stated he was prejudiced was true, so to ease his conscience he announced: "The law applicable to this case has been

exhausted." And he did try, convict and sentence the defendant.

There is no allegation that the plaintiff in the trial court is now entitled to the possession of the premises.

If they are not now entitled to the possession the complaint does not state facts sufficient to give the court jurisdiction to award possession to them or to hear or determine this case.

From the allegations of the supplemental complaint, the trial court waited for the land office to act. In these kind of cases the jurisdiction of the land office is separate and distinct from the court.

Nowhere have I been able to find any law giving the district court of Alaska any jurisdiction over these kind of cases.

The character of the land belongs exclusively to the land office—that is why a protestant has no standing in court.

Courts deal with titles (Possession)

I have been unable to find any law giving corporate powers to any one at the time this suit was brought.

The supplemental complaint is for matters that have arisen since filing the original complaint. Now, then, treating this supplemental complaint as it is, they are simply protestants not in possession, not entitled to possession, never ousted and claim no right whatever to the land or any portion of it. The more I study this case the more I think the law applicable thereto was exhausted before the complaint

was filed. This is the third void judgment of this district court I have presented, I guess that void judgments are not comparable, when they are void, they are just void and that is the end of it. In this action there is no plaintiff who has any standing in court or right to sue. If there was a plaintiff the facts alleged, do not give the court jurisdiction to act.

The proceedings are under a special statute, no, not under any statute, they are endeavoring to impress them with the character of being under a special act. If they were under that special act there would be no supplemental complaint, because the act in relation to adverse claims especially enjoins the land office acting until the matters have been adjudicated by the courts.

In the case at bar the foundation of the action is an adjudication from the land office. In the decision, the following language is used:

"The plaintiffs (in the trial court) filed their adverse claim in the land office and this suit is brought in support thereof."

An action of ejectment brought in support of an adverse suit? The worst fooled of all men is the one who fools himself. The job turned out by a counsel, who does not understand the law of pleadings and a court, a raw hand at mining litigation, resembles, I fancy, a job a printer would turn out in making a pair of pants.

I was trying a mining case in this district court, an ejectment action. My fee was contingent; the

defendant on the trial admitted the ouster, already I felt the musical gingle of the twenties in my pocket —and, well, as we get older there is a good deal of anticipation instead of realization. The honorable district court took the case under advisement, in its decision, about the following language was used: "Plaintiff seeks a recovery on the admission of the ouster by defendant—Now ouster is of two kinds, lawful and unlawful, the defendant did not say which kind he admitted. The rule of law being to give the defendant the benefit of a doubt, I find the ouster to be a lawful ouster, and judgment will be entered for the defendant." There was a feeling of absentness, where in thought, my twenties had been. I considered *that* decision "fierce"—The world progresses and it seems that ignorance keeps abreast of the times.

Chief Justice Beatty, now of the Supreme court of California, at one time in one of the courts over which he was chief justice in one of the states to which that court belonged said of and ~~covering~~ a ~~collateral~~: His decisions are pernicious."

A lawyer must not say that of a courts decisions— I have never found any law against his thinking.

Respectfully Submitted,

E. M. BARNES,

Attorney for Plaintiff.

No. 1875

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff),

Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), (Defendant),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1875

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BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff),

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[Names and Addresses of Attorneys.]

FRANK B. KINYON, Esq., Messrs. CAVANAH & BLAKE, Boise, Idaho,
Attorneys for Appellant.

Messrs. JOHNSON & JOHNSON, Boise, Idaho,
Attorneys for Appellee.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho,
Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY (a Corporation),
Defendant.

Amended Complaint.

Comes now the above-named plaintiff, Boise City, a municipal corporation of the State of Idaho, and for cause of action against the defendant herein, complains and alleges:

I.

That the plaintiff, Boise City, is now and at all times hereinafter mentioned, has been a municipal corporation within the county of Ada, State of Idaho, created by and existing under the laws of the State of Idaho.

II.

That the defendant is a private corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho, and is authorized and empowered by its articles of incorporation to carry on and conduct a waterworks system and to sell and rent water to the inhabitants of said Boise City.

III.

That on the third day of October, 1889, said Boise City, by its Mayor and Common Council, passed and adopted on ordinance granting to one H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks, a license for an indefinite period to lay, construct and repair waterpipes in the streets and alleys of said Boise City, through which water is now and at all times herein mentioned has been furnished by said defendant and its predecessors in interest in and to said waterworks system to the plaintiff, and the residents and inhabitants of said Boise City for profit, which said ordinance was accepted by the said predecessors in interest of said defendant in and to said waterworks system, a copy of said ordinance approved October 3d, 1889, is as follows, to wit:

ORDINANCE No. 94.

AN ORDINANCE GRANTING TO EASTMAN BROTHERS THE RIGHT TO LAY WATER PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, I. T., ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damages done by them or their pipes or by water escaping therefrom.

Section 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3d day of October, 1889.

Approved:

JAMES A. PINNEY,

Mayor.

[Seal] Attest: C. S. McCONNEL,

City Clerk.

IV.

That the said defendant, The Boise Artesian Hot and Cold Water Company, now is and has been for a period of more than two years last past, the successor in interest of the said H. B. Eastman and B. M. Eastman, in and to the waterworks system herein referred to, and are now and for a period of more than two years last past, has been engaged in the sale and rental of water for profit from its said waterworks system to the plaintiff and the residents and inhabitants of said Boise City under the provisions of the aforesaid ordinance and license.

V.

That the said defendant, the Boise Artesian Hot and Cold Water Company, and its predecessors in interest in and to its said waterworks system, are now, and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff and the residents and inhabitants of said Boise City through the water-pipes of said waterworks system, and in the laying and repairing of said water-pipes connected with its said waterworks system.

VI.

That the plaintiff, Boise City, on the 7th day of June, 1906, enacted and approved an Ordinance of said City No. 678, requiring the said defendant, the Boise Artesian Hot and Cold Water Company to pay to said Boise City on the first day of each and every month, a monthly license of three hundred ($300.00) Dollars for the use and occupancy of the streets and alleys of said Boise City by the said defendant in the sale and delivery of water to the plaintiff and the residents and inhabitants of said Boise City, through the said water-pipes of said defendant laid and maintained by said defendant in the streets and alleys of said Boise City, and for the privilege granted by the aforesaid Ordinance No. 94, approved October 3, 1889; that in said Ordinance No. 678, demand was thereby made by said Boise City of and from the said defendant to thereafter pay to said Boise City on the first day of each and every month, said monthly license of $300.00,

and the City Clerk of said Boise City was required by the provisions of said Ordinance No. 678 to notify said defendant of the requirements of said Ordinance No. 678.

VII.

That the whole number of the members of the Common Council of the plaintiff, Boise City, on the 7th day of June, 1906, was twelve (12) members, and that said Ordinance No. 678, after the same was vetoed by the Mayor of the plaintiff on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the common council of said Boise City over the veto of said Mayor by a two-third vote cast by the members of the Common Council of said Boise City.

VIII.

That the City Clerk of said Boise City duly notified the said Boise Artesian Hot and Cold Water Company of the requirements of said Ordinance No. 678, and from and after the enactment of said Ordinance No. 678, and until this action was begun did on the first day of each and every month demand of said defendant the payment of said monthly license of $300.00 required by said ordinance, but the said defendant refused on the first day of each and every month after the enactment and approval of said ordinance No. 678 until the beginning of this suit, and still refuses and neglects to pay said monthly license or any part thereof to said Boise City.

IX.

That on the 6th day of December, 1906, the plaintiff by its Mayor and Common Council, passed and

approved an Ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any Court of competent jurisdiction against the said defendant for the enforcement of the provisions of said Ordinance No. 678, and the collection from said defendant of the sum of money due said Boise City from said defendant under the provisions of said Ordinance No. 678.

X.

That all of the aforesaid ordinances referred to herein are now and ever since their said passage and approval have been in force and have never been repealed.

XI.

That the said defendant and its predecessors in interest in and to said waterworks system have never at any time paid to said Boise City any compensation for the use and occupancy of said streets and alleys of said Boise City by the said waterworks system of the defendant.

XII.

That by reason of the enactment and approval of the aforesaid ordinance and the use and occupancy of the said streets and alleys of said Boise City by the said defendant as aforesaid with its said waterworks system, the said defendant became and was on the first day of April, 1909, and now is indebted to Boise City in the sum of Ten Thousand One Hundred Thirty ($10,130.00) Dollars due as said license.

XIII.

That the said plaintiff did on the first day of each and every month from the said 7th day of June, 1906, to the first day of April, 1909, demand of the said defendant to pay the said amount due as said license, but the defendant refused and neglected to pay the same or any part thereof and that there is due and owing to the plaintiff on the first day of April, 1909, as such license the sum of Ten Thousand One Hundred Thirty ($10,130.00) Dollars.

Wherefore, the plaintiff prays judgment against the defendant herein for the sum of Ten Thousand One Hundred Thirty ($10,130.00) Dollars, together with interest thereon at the rate provided by law, from the date of filing this complaint until paid and for costs of suit.

F. B. KINYON,
Attorney for Plaintiff.
Residence, Boise, Idaho.

State of Idaho,
County of Ada,—ss.

Joseph T. Pence, being first duly sworn for and on behalf of Boise City, the above-named plaintiff, deposes and says: That he has read the foregoing amended complaint, knows the contents thereof and the facts therein stated are true of his own knowledge, except as to those matters which are therein stated to be on his information or belief, and as to those matters that he believes it to be true. That the above-named plaintiff, Boise City, situated in Ada County, Idaho, is a municipal corporation

organized and existing under and by virtue of the laws of the State of Idaho, and that affiant is the duly elected, qualified and acting Mayor of said plaintiff, and therefore he makes this affidavit as such Mayor for and on behalf of said plaintiff.

JOSEPH T. PENCE.

Subscribed and sworn to before me this 26 day of April, 1909.

[Seal] E. C. ROWELL,
Notary Public.

Service of a copy of the foregoing Amended Complaint is hereby acknowledged this 12th day of May, 1909.

JOHNSON & JOHNSON and
EDGAR WILSON,
Attorneys for Defendant.

[Endorsed]: Filed April 26, 1909. W. L. Cuddy, Clerk. By W. D. McReynolds, Deputy Clerk.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Petition for Removal.

To the Honorable District Court of the Third Judicial District of the State of Idaho, in and for Ada County:

Your petitioner, the Boise Artesian Hot and Cold Water Company, Limited, the above-named defendant, appearing specially for the purpose of this petition only, respectfully shows to this Honorable Court, that this suit is of a civil nature, and that the matter and amount in dispute in said suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

That the controversy herein is and at the time of the commencement of this suit was between citizens of different States; and that your petitioner, the defendant in said suit, was, at the time of the commencement of the suit, and still is, a corporation organized and existing under the laws of the State of West Virginia, and a resident and citizen of said State and of no other State; and that the plaintiff, Boise City, is a municipal corporation organized and existing under the laws of the State of Idaho and a citizen of said state.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the Central Division of the District of Idaho, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the next Circuit Court of the United States to be held in the Central Division of the District of Idaho, pursuant to the Statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And your petitioner will ever pray.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, Petitioner.

By B. S. HOWE,
Secretary.

EDGAR WILSON and
JOHNSON & JOHNSON,
Its Attorneys,

Specially appearing for the purposes of this petition only.

State of Idaho,
County of Ada,—ss.

B. S. Howe, being first duly sworn, deposes and says that he is the secretary of the Boise Artesian Hot and Cold Water Company, Limited, the above-named petitioner and makes this verification for and on behalf of said petitioner. That the foregoing petition is true to his own knowledge.

B. S. HOWE.

Subscribed and sworn to before me this 13th day of May, 1909.

[Seal] RICHARD H. JOHNSON,
Notary Public.

[Endorsed]: Filed May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Bond on Removal.

Know All Men by These Presents: That the Boise Artesian Hot and Cold Water Company, Limited, as principal and Timothy Regan and James E. Clinton, Jr., of Boise City, Ada County, Idaho, as sureties, are holden and stand firmly bound unto Boise City, a municipal corporation of the State of Idaho, in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto said Boise City, we bind ourselves, our heirs, representatives and assigns jointly and severally firmly by these presents,

Upon condition nevertheless that, whereas, the said Boise Artesian Hot and Cold Water Company, Limited, has petitioned the District Court of the Third Judicial District of Idaho, held in and for Ada County, for the removal of a certain cause

therein pending, wherein the said Boise City is plaintiff and the said Boise Artesian Hot and Cold Water Company, Limited, is defendant to the Circuit Court of the United States for the Central Division of the District of Idaho.

Now, if the said Boise Artesian Hot and Cold Water Company, Limited, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

In Witness Whereof, the said Timothy Regan and James E. Clinton, Jr., have hereunto set their hands and seals this 13th day of May, 1909.

TIMOTHY REGAN. [Seal]
JAMES E. CLINTON, Jr. [Seal]

State of Idaho,
County of Ada,—ss.

Timothy Regan and James E. Clinton, Jr., being first duly sworn, each for himself and not one for the other, deposes and says, that he resides in Boise City, Ada County, Idaho, and is freeholder therein and above all property, exempt from execution.
and is worth the sum of two thousand dollars over

TIMOTHY REGAN.
JAMES E. CLINTON, Jr.

Subscribed and sworn to before me this 14th day of May, 1909.

[Seal] RICHARD H. JOHNSON,
Notary Public.

[Endorsed]: Filed, May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Order of Removal.

This cause coming on for hearing upon application of the defendant herein for an order transferring this cause to the United States Circuit Court for the District of Idaho, Central Division, and it appearing that the defendant has filed its petition for such removal in due form of law, and that defendant has filed its bond duly conditioned, with good and sufficient sureties as provided by law, and it appearing to the Court that by the filing of plaintiff's amended complaint the amount prayed for in said complaint and in controversy in this action, exclusive of interest and costs, has been increased from

seventeen hundred and fifty dollars, the amount prayed for in the original complaint, to ten thousand one hundred and thirty dollars, and that defendant has not pleaded to said amended complaint or demurred or answered thereto, and that the time has not elapsed wherein defendant is allowed under the practice and laws of the State of Idaho, and the rules of said court, to appear, plead, demur or answer said amended complaint, and it appearing that this is a proper cause for removal to said Circuit Court.

Now, therefore, it is hereby ordered and adjudged that this action be and it is hereby removed to the United States Circuit Court for the District of Idaho, Central Division, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 15 day of May, 1909.

FREMONT WOOD,

Judge.

[Endorsed]: Filed, May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

[Certificate to Record on Removal.]

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

CLERK'S CERTIFICATE WITH RECORD.

State of Idaho,
County of Ada,—ss.

I, W. L. Cuddy, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, hereby certify the above and foregoing to be a full, true and correct copy of the record, and whole thereof, in the above-entitled action, heretofore pending in said District court, being the action wherein Boise City, a Municipal Corporation is plaintiff and The Boise Artesian Hot and Cold Water Company, Limited, is defendant, said record consisting of the original complaint, filed on the 13th day of December, 1906, the summons and return thereon, filed on the 15th day of December, 1906, demurrer to original complaint filed on the 17th day of January, 1907, stipulation, filed on the 27th day of February, 1907, amended complaint, filed April 26th, 1909, order of the Court permitting plaintiff to file amended com-

plaint, petition for removal filed May 15th, 1909, bond on removal filed May 15th, 1909, and order of removal filed May 15th, 1909, all as appears on the files and of record in my office.

Given under my hand and the seal of said Court, at my office in Boise City, Idaho, this 17th day of May, 1909.

[Seal] W. L. CUDDY,
Clerk of District Court, Ada County, Idaho.
By Otto F. Peterson,
Deputy.

I, Frank B. Kinyon, City Attorney of Boise City, and attorney for plaintiff herein, do hereby acknowledge the receipt of notice of the removal of said action to the Circuit Court of the United States for the District of Idaho, Central Division, and of the filing of the transcript of the record with the Clerk of said Circuit Court of the United States, this 17th day of May, 1909.

FRANK B. KINYON,
City Attorney and Attorney for Plaintiff.

[Endorsed]: Filed, May 17, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Stipulation [Filed January 6, 1909, of Facts].

It is hereby stipulated by counsel in the above-entitled action that the defendant has furnished water to plaintiff as shown in the annexed statement, during the years 1908 and 1909; and paid the defendant the amounts thereon stated.

That the city council of plaintiff in the month of December, 1909, by resolution directed defendant company to install fire hydrants for use by the city fire department on the defendant mains as follows: On the corner of North 17th and Sherman Streets, North 19th and Sherman Streets, North 17th and Brumback Streets, North 21st and Ressigue Streets, and West State and 19th Streets.

That the plaintiff reserves its objections to the admissibility of the above facts on the ground that they are irrelevant, immaterial and incompetent and not a defense to the action.

Dated January 6th, 1909.

F. B. KINYON and
CAVANAH & BLAKE,
Attorneys for Plaintiff.
JOHNSON & JOHNSON.
Attorneys for Defendant.

AMOUNTS PAID BY CITY OF BOISE TO THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, from January 1st, 1908, to December 1st, 1909.

Date Paid.		Domestic Use.	Flushing Sewers.	Street Sprinkling.	Heating.
1908					
January	4th	45.55	348.30...	880.80	
February	8	30.40	177.55...		
March	7	23.05	176.40...		
April	6	24.55	176.40...		
June	6	45.15	307.45...		
August	10	50.24	94.60...		
Sept.	10	29.66	47.30...		
Oct.	6	30.03	47.30...		
Nov.	7	31.16	47.30...	3,300.00	
Dec.	5	26.00	47.30...		500.00
1909					
January	6			354.46	
March	8	69.80	140.82...		
May	10	32.60	47.30...		
June	9	36.60	47.30...		
July	6	40.55	47.30...		
August	18	49.75	47.30...		
Oct.	4	67.50	94.60...	2,000.00	
Nov.	7	57.00	47.30...		337.00
Dec.	4	38.25	47.30...	1,763.84	
		$727.84	$1,989.12	$8,299.10	$837.50

Summary:

Cold Water for Domestic Use.....	727.84
" " " Sewer Flushing.....	1989.12
" " " Street Sprinkling.....	8299.10
Hot Water for Heating City Hall.....	837.50
Total.....	$11853.56

[Endorsed]: Filed Jan. 6, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Answer to Amended Complaint.

The above-named defendant answers plaintiff's amended complaint filed in the above-entitled action, as follows:

I.

This defendant admits the first and second allegations of said complaint and also evers that in addition to the power and authority mentioned in said second allegation, this defendant was expressly authorized and empowered by its charter or articles of

incorporation, among other things, to take, purchase, acquire, hold, operate and maintain the rights and properties of water companies, associations or corporations, and to acquire, use, own, and operate all properties, franchises, rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be successors in every respect of the said corporation; and defendant's said charter provided, that its period of existence should be fifty years from and after the date of its incorporation, or to and until the first day of September, A. D. 1950.

This defendant further avers that within three months from the time it commenced to do business in the State of Idaho, to wit, on the fourth day of September, 1901, it designated B. S. Howe, a person residing in Ada County, Idaho, the county in which its principal place of business in Idaho is conducted upon whom process issued by authority of, or under any law of said State, might be served, and on said last-named date, filed such designation in the office of the Secretary of State of the said State of Idaho and in the office of the Clerk of the District Court of said County of Ada; and defendant further avers that within three months after the taking effect of the act of the legislature of Idaho approved March 10, 1903, relating to foreign corporations, it filed with the county recorder of said county of Ada, a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said county recorder with the Secretary of State of Idaho, and all

of said designations have ever since remained and now are in full force, and said copies have ever since remained and are now on file in said offices.

II.

The defendant admits that the ordinance set forth in the third allegation of plaintiff's amended complaint was passed and adopted by said Boise City at the time and in the manner set forth in said allegation, but defendant denies that said ordinance was merely a license for an indefinite period to lay, construct or repair water-pipes in the streets and alleys of said city, but avers that said ordinance became, when acted upon by the grantees therein and their successors in interest, a franchise as hereinafter more fully set forth.

III.

The defendant admits the fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of said complaint.

IV.

The defendant denies that by reason of the enactment and approval of the ordinances mentioned in said complaint, or by its use or occupancy of the streets and alleys of Boise City with its waterworks system, it became or was on the first day of April, 1909, or at any other time, indebted to said Boise City in the sum of ten thousand one hundred thirty dollars, or in any sum whatever.

V.

The defendant admits the demands made upon it by plaintiff, and its refusal to pay the amounts demanded, as alleged in the thirteenth allegation of

said complaint, but denies that it was indebted to plaintiff on the first day of April, 1909, or at any other time, in the sum of ten thousand one hundred thirty dollars, or in any sum whatever.

VI.

And further answering said complaint, this defendant avers, that on the tenth day of July, 1890, the Mayor and Common Council of plaintiff, under authority contained in its charter and the general laws of Idaho, duly passed an ordinance granting to the Artesian Water and Land Improvement Company, a corporation, and its successors and assigns, the privilege of laying down and maintaining water-pipes in the streets and alleys then laid out, or thereafter to be laid out and dedicated in said Boise City, a copy of which ordinance is hereto annexed, made a part of this answer, and marked Exhibit "A."

VII.

That the said Artesian Water and Land Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying said plaintiff and its inhabitants with water for public and family uses, and after the passage and approval of the ordinance mentioned in the sixth allegation hereof, the said Artesian Water and Land Improvement Company accepted the same and immediately proceeded thereunder and with due diligence, to sink artesian wells, construct reservoirs and lay pipes under and along plaintiff's streets and alleys and to supply plaintiff and its inhabitants with

pure, fresh water for municipal, domestic and irrigation purposes. That up to the time said last named company sold and conveyed its said waterworks and property to the Artesian Hot and Cold Water Company, Limited, as hereinafter alleged, it expended in the construction, extension and improvement thereof, over fifty thousand dollars.

VIII.

That after the passage and approval of the ordinance set forth in the third paragraph of plaintiff's amended complaint, the said H. B. Eastman and B. M. Eastman, accepted the same and immediately proceeded thereunder and with due diligence, to construct a waterworks plant or system, consisting of artesian wells, and reservoirs, and laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its inhabitants with pure mountain water in accordance with said ordinance. That up to the time said Eastmans sold and conveyed their said waterworks plant and rights to the Artesian Hot and Cold Water Company, Limited, as hereinafter alleged, they had expended in the construction thereof over twenty thousand dollars.

IX.

That the Artesian Hot and Cold Water Company, Limited, was a corporation duly organized under said laws of the State of Idaho, relating to water and canal corporations, and was authorized by its articles of incorporation, to supply plaintiff and its inhabitants with water for municipal and domestic uses, and to purchase and acquire the waterworks, wells,

reservoirs, pipe-lines, properties, rights and franchises of the said Eastman Brothers and said Artesian Water and Land Improvement Company. That on the 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited, purchased for a valuable consideration the said Eastman Brothers waterworks system and all property belonging thereto and all rights, privileges and franchises granted to said Eastmans under the ordinance set forth in the third allegation of said complaint, and that on the said 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited, also purchased for a valuable consideration, the said waterworks system of said Artesian Water and Land Improvement Company, and all property belonging thereto and all rights, privileges and franchises granted to said company under the ordinance mentioned in the sixth allegation hereof, or by the laws of Idaho. That from and after the said 28th day of March, 1891, and until the sale of its waterworks and property in the year 1901, as alleged in the next allegation hereof, the said Artesian Hot and Cold Water Company, Limited, acting under authority of said ordinances and the said laws of Idaho, supplied plaintiff and its inhabitants with pure, fresh water for municipal, domestic and other useful purposes, in all respects in accordance with said ordinance and as required by said laws of Idaho. That during the said period of time plaintiff's population increased from about three thousand to about six thousand inhabitants and the area thereof was greatly enlarged by the laying out and platting of additions thereto,

which were settled upon and occupied, and during said period said company with the plaintiff's knowledge and consent, extended its pipe-lines under the streets and alleys of said city from time to time and supplied said additions with water to meet the demands therefor. That during said period said Company laid about fifteen miles of additional pipe-lines for cold water supply, constructed two wells, and one reservoir for cold water, erected a large steam pumping plant with a capacity of 3,000,000 gallons per day and made improvements to its cold water plant aggregating in cost, more than one hundred and ninety-two thousand dollars.

X.

That on the 28th day of August, 1901, defendant purchased for valuable consideration, the entire waterworks system and plant of said Artesian Hot and Cold Water Company, Limited, including all of its wells, reservoirs, pumping plants, pipe-lines, pipes, real and personal property of every nature, and also all of the rights, privileges and franchises which had been granted to it and to its predecessors in interest by the ordinances of plaintiff, hereinbefore referred to, and by the laws of Idaho. That at all times since said 28th day of August, 1901, this defendant has supplied to plaintiff and its inhabitants, by virtue of said ordinance and laws, and with plaintiff's knowledge, acquiescence and consent, pure, fresh water for municipal, domestic and other useful purposes in accordance with said ordinances and in full compliance therewith and with said laws of Idaho. That since said last named date, plain-

tiff's population has increased from about six thousand to over twenty-five thousand inhabitants, and this defendant, with plaintiff's knowledge, acquiescence and consent, has extended its cold water system to meet the growth of said city, and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system, an additional sum of more than one hundred and forty thousand dollars.

XI.

That the supplying of water to said Boise City and its inhabitants by this defendant and its predecessors in interest and the use by them of its streets and alleys during the past twenty years has been under authority of said ordinances and the laws of Idaho, before referred to, and was and is an important public service of great benefit to said plaintiff and its inhabitants and was the consideration for which plaintiff granted said franchises, as aforesaid, and it was upon the faith of said grants and the reliance thereon that defendant and its grantors made the expenditures aforesaid, but defendant avers that at the time of the passage of said ordinance mentioned in the sixth allegation of said complaint, the said plaintiff and its mayor and common council claimed and have ever since claimed that said grants

to said Eastmans and said Artesian Water and Land Improvement Company were and are mere licenses which may be revoked or annulled at the will of said common council and that said common council may compel this defendant to discontinue its business of supplying water and of using said streets and alleys therefor, or subject it to the payment of said license fee or any other burdens for such privilege, and said common council enacted said license tax ordinance on this ground only, but this defendant avers that said grants, when accepted and acted upon by defendant and its grantors, as aforesaid, became and are franchises and binding contracts between plaintiff and defendant for the purposes aforesaid.

XII.

That each and every year since this defendant and its grantors have been engaged in the business of supplying water, as aforesaid, their waterworks and all property, both real and personal owned by them in the Territory and State of Idaho, have been duly assessed for payment of all state and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof, as all other property in said Boise City, and this defendant and its predecessors in interest have each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against its property.

XIII.

That on the 11th day of May, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and

the Act approved March 9th, 1905, amendatory thereof, two commissioners were appointed by the Mayor and Common Council of said plaintiff and two commissioners were thereafter appointed by this defendant for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City. That said commissioners duly met and organized and continued in session over two months, and adopted a schedule of rates to be charged by defendant for all of said purposes, as required by said statute. That the plaintiff and defendant were represented by counsel before said commission and a large amount of evidence was introduced and the said commission carefully investigated the value of defendant's waterworks plant and reasonable operating expenses and deterioration thereof and fixed rates to be charged said city and its inhabitants for water at figures which were intended to yield to defendant, a net return of six per cent per annum, upon the then value of its plant, and defendant avers that said rates have not up to the present time and will not, in the future, to the best of defendant's information and belief, yield to defendant any greater net return.

That the said rates, adopted by said commission went into effect on the first day of August, 1905, and were accepted by plaintiff and defendant, and ever since have been and now are in full force and effect, and have never been repealed or modified, and, under the provisions of said statutes, will continue in force until new rates are established. That this defendant has at all times acquiesced in the rates fixed by

said commission, and regulated its charges in accordance therewith.

That the license tax levied by said plaintiff against this defendant under the ordinance mentioned in the sixth allegation of said complaint was not considered or contemplated by said commissioners in fixing said rates to be charged by this defendant, and the enforcement and collection of said license tax as prayed for in said complaint will reduce the defendant's net income to an amount considerably less than that fixed by said commission and which would be entirely inadequate, unreasonable and unfair and which would amount to confiscation of defendant's property.

XIV.

This defendant further avers that the Capital Water Company is a corporation organized under said laws of Idaho, relating to water and canal corporations, for the purpose of supplying said Boise City and its inhabitants with water, and said company is now and for a long time past has been engaged in the business of supplying water to plaintiff and its inhabitants for municipal, domestic and other useful purposes, under ordinances granted by plaintiff and under the said laws of Idaho, and said company is using and occupying the plaintiff's streets and alleys with its pipes and mains in the same manner and for the same purposes as this defendant, but said company is not required by the said plaintiff by ordinance or otherwise to pay any license or tax whatever for such privileges, and there are also numerous other individuals, associations and cor-

porations using plaintiff's streets and alleys for the purpose of supplying plaintiff and its inhabitants with electric lights and gas and for street railroad, telegraph and telephone purposes, none of whom are required by plaintiff to pay any license or tax for the privilege of carrying on their business or using said streets and alleys.

XV.

This defendant further avers that by reason of the premises, the said ordinance mentioned in the sixth allegation of said complaint, as sought to be enforced by said plaintiff in this action, will impair and destroy the said franchises and contract rights of this defendant and the obligations thereof, and is therefore in contravention of the provisions of article I, section 10, of the Constitution of the United States, forbidding any legislation impairing the obligation of contracts, and is invalid; and that the enforcement of said ordinance will deprive this defendant of its property without due process of law and deny to this defendant the equal protection of the laws, in violation of the Federal Constitution of the Fourteenth Amendment thereto, and that said ordinance amounts to double taxation of defendant's property, and is unreasonable and oppressive and is in violation of the constitution and laws of the State of Idaho.

Wherefore, this defendant prays that it may be hence dismissed with its costs and disbursements incurred herein.

RICHARD H. JOHNSON and
EDGAR WILSON,

Attorneys for Defendant, Residence, Boise, Idaho.

RICHARD Z. JOHNSON,
Of Counsel.

State of Idaho,
County of Ada,—ss.

Benjamin S. Howe, being first duly sworn, deposes and says that he is an officer, to wit, the Secretary of the above-named defendant and makes this verification for and on behalf of said defendant. That he has read the foregoing answer and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be on his information or belief, and as to those matters that he believes it to be true.

[Seal] B. S. HOWE.

Subscribed and sworn to before me this 14th day of May, 1909.

RICHARD H. JOHNSON,
Notary Public.

Exhibit "A" [to Answer to Amended Complaint].

An Ordinance Granting to the Artesian Water and Land Improvement Company, the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys

now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

Section 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

Section 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

I hereby acknowledge service of a copy of the foregoing Answer to Amended Complaint this 18th day of May, 1909.

F. B. KINYON,
City Attorney and Attorney for Plaintiff.

[Endorsed]: Filed May 18, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Motion to Strike.

Comes plaintiff and moves to strike from the answer of the defendant herein the following:

I.

To strike from paragraph I of said answer all that portion thereof beginning with the word "and," at the end of line one and ending with the words, "September, A. D. 1950," at the end of line fourteen on the first page thereof, for the following reasons:

a. For the reason that said allegations are irrelevant and have no substantial relation to the question in controversy, and can in no event affect the decision of the Court.

b. That in the particulars set forth under *a* said matter is redundant.

II.

To strike from said answer that portion of paragraph VII, beginning in line thirteen with the words "that up to the time," and thence to the end of said paragraph VII, for the reasons set forth in paragraph I hereof, reference to which is hereby made.

III.

To strike from paragraph VIII of said answer that portion thereof beginning with the words "That up to the time," in line nine thereof, and thence to the end of the paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

IV.

To strike from paragraph IX of said answer that portion thereof beginning in line thirty of said para-

graph being line seven on page six of said answer, with the words, "that during the said," and thence to the end of the paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

V.

To strike from said paragraph IX of said answer that portion thereof beginning in line thirty-eight thereof, and being line fifteen on page six, with the words, "that during said period," and thence to the end of said paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VI.

To strike from paragraph X of said answer that portion thereof beginning with line fifteen, being line eight on page seven, with the words, "that since said last named," and thence to the end of the said paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VII.

To strike from said answer the whole of paragraph XIII, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VIII.

To strike from said answer the whole of paragraph XIV, for the reasons and upon the grounds set forth in the first paragraph hereof, reference to which is hereby made.

Wherefore, etc.,

F. B. KINYON,
Attorney for Plaintiff,
Residing at Boise, Idaho.

Service of the within and foregoing Motion to Strike, with copy, admitted this 17th day of June, 1909.

EDGAR WILSON and
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed]: Filed June 17th, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT and COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Demurrer.

Comes the plaintiff and without waiving its motion to strike filed herein, files this its demurrer to the answer of the defendant herein, and for ground thereof alleges:

I.

That said answer does not state facts sufficient to constitute a defense.

II.

That said answer is uncertain in that it cannot be determined therefrom whether the clause "Laws of

the State of Idaho," as used in paragraphs 9, 10 11 and 14, refers to Title Four of the Revised Codes relating to corporations or whether it refers to Section 2711 of the Revised Statutes of Idaho, and the Act approved March 9, 1905, amendatory thereof, or whether it refers to Chapter Five of Title Four of the Civil Code of Idaho relating to Water and Canal corporations, or whether the same refers to still other Laws of the State of Idaho.

III.

That said answer is ambiguous for the reasons assigned in paragraph II, hereof relating to uncertainty.

IV.

That said answer is unintelligible for the reasons assigned in paragraph II, hereof relating to uncertainty.

Wherefore, etc.,

F. B. KINYON,
Attorney for Plaintiff,
Residing at Boise, Idaho.

Service of the within demurrer, with copy admitted this 17th day of June, 1909.

EDGAR WILSON and
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed]: Filed June 17, 1909. A. L. Richardson, Clerk.

Ordinance No. 699.

By Councilman DAVIS.

AN ORDINANCE ORDERING AND REQUIRING THE PROPER OFFICERS OF BOISE CITY, IDAHO, TO INSTITUTE AN ACTION FORTHWITH IN ANY COURT OF COMPETENT JURISDICTION FOR THE ENFORCEMENT AND COLLECTION OF ALL SUMS OR AMOUNTS OF MONEY DUE SAID BOISE CITY UNDER THE PROVISIONS OF ORDINANCE 678, ENACTED AND APPROVED BY SAID CITY ON JUNE 7, 1906.

BOISE CITY DOES ORDAIN AS FOLLOWS:

Sec. 1. That the proper officers of Boise City, Idaho, are hereby instructed, required and ordered to institute forthwith an action for and on behalf of and in the name of said Boise City in any court of competent jurisdiction for the enforcement and collection of all sums or amounts of money due said Boise City, under provisions Ordinance 678, enacted and approved by said Boise City, on June 7, 1906.

Sec. 2. This Ordinance shall take effect and be in force from and after its passage and approval.

PASSED by the Common Council of Boise City, Idaho, this 6th day of December, 1906.

APPROVED by the Mayor of Boise City, Idaho, this 6th day of December, 1906.

APPROVED
JAS. A. PINNEY,
Mayor.

Attest: E. L. SAVIDGE,
City Clerk.

I, Emily L. Savidge, City Clerk of Boise, Idaho, hereby certify that the above and foregoing is a true and correct copy of original Ordinance 699, passed the common council December 6, 1906, approved by the Mayor December 6th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City, Idaho, this 27th day of December, 1906.

[Seal] E. L. SAVIDGE,
City Clerk.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT and COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Stipulation [Filed October 23, 1909] of Facts.

It is hereby stipulated by and between the parties to the above-entitled action by their attorneys herein that the following shall constitute a statement of the facts agreed upon in said action to be used on the final trial hereof before the court, a jury being expressly waived herein.

1. The first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of plaintiff's amended complaint are admitted.

2. All of the third allegations of said complaint is admitted except that portion thereof on the fourth and fifth lines of said allegation, which states, that said ordinance is "a license for an indefinite period."

3. That the first, seventh and eighth allegation of defendant's answer to said amended complaint are hereby admitted to be true.

4. That the sixth allegation of defendant's said answer, including Exhibit "A" therein referred to, is hereby admitted to be true, but plaintiff does not admit that the ordinances referred to in said allegation were passed by the common council of plaintiff under authority of the general laws of Idaho.

5. That the ninth and tenth allegations of defendant's said answer are hereby admitted to be true, but plaintiff does not admit that the ordinances mentioned in said allegations and in the said sixth allegation are franchises or that defendant furnished such water under authority of or in accordance with the laws of Idaho, or that such laws apply to the furnishing of water in Boise City, but plaintiff admits that the defendant and its predecessors in interest in furnishing such water complied with all conditions and requirements contained in such laws, and plaintiff reserves its objection as to the admissibility of the facts set forth in the said ninth and tenth allegations on the ground that they are irrelevant, incompetent and immaterial and no defense to the action.

6. As to the eleventh allegation of said answer, plaintiff admits that after the passage of said ordinances purporting to give the rights to use the streets and alleys of said city, the predecessors of said defendant proceeded to lay their pipes and supply said water, and that defendant and its said predecessors in interest have ever since continued so to do by reason of the passage of said ordinances, and that since the passage of said ordinance mentioned in the sixth allegation of said complaint said plaintiff and its common council have claimed that said ordinances were and are revocable licenses, as alleged in said eleventh allegation of said answer.

7. The twelfth allegation of said answer is hereby admitted to be true, but plaintiff reserves the objection that the facts therein stated are immaterial, irrelevant and incompetent and not a defense to the action.

8. As to the thirteenth allegation of said answer, plaintiff admits the appointment of the commissioners, and that they met and adopted a schedule of rates to be charged by defendant for all purposes mentioned in said allegation, and that said rates were intended to yield the net return of six per cent mentioned therein and that they do not now and will not yield a greater return, and that the said rates so fixed by said commission were after August 1, 1905, and still are charged by defendant for water, and that defendant has at all times acquiesced in the rates so fixed and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said commission in fixing said

rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission, as set forth in said thirteenth allegation of said answer, but plaintiff does not admit that the statutes referred to in said allegation have application to the appointment of commissioners in said Boise City, or that they could be legally appointed pursuant to said statutes.

9. That the fourteenth allegation of said answer is hereby admitted to be true and it is stipulated that the franchise to the Capital Water Company mentioned therein is by its terms limited to endure for a period of fifty years, and plaintiff reserves its legal objection that said franchise was not granted under the laws of Idaho therein referred to, and that the facts stated in said thirteenth and fourteenth allegations are irrelevant, incompetent and immaterial and not a defense to the action.

10. It is admitted that the said Eastman Brothers and the said Artesian Water and Land Improvement Company and said defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys, and that no pecuniary consideration therefor was ever demanded or required by said plaintiff therefore, prior to the passage of said Ordinance No. 678, which is hereto attached, marked Exhibit 1, and is admitted in evidence.

11. It is admitted that plaintiff has made due and proper demand upon defendant for the payment of

the amount prayed for in said complaint and that defendant has paid no part thereof.

Dated October 22, 1909.

F. B. KINYON and
CAVANAH & BLAKE,
Attorneys for Plaintiff.
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed]: Filed October 23, 1909. A. L. Richardson, Clerk.

Exhibit No. 1.

ORDINANCE #678.

By Councilman Davis.

AN ORDINANCE REQUIRING THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, A PRIVATE CORPORATION, ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF WEST VIRGINIA, TO PAY TO BOISE CITY A MUNICIPAL CORPORATION OF THE STATE OF IDAHO ON THE FIRST DAY OF EACH AND EVERY MONTH, A MONTHLY LICENSE OF $300.-00 FOR THE USE AND OCCUPANCY OF THE STREETS AND ALLEYS OF SAID BOISE CITY, IDAHO, IN FURNISHING WATER TO THE RESIDENTS OF SAID CITY.

WHEREAS, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and,

WHEREAS, the Boise Artesian Hot and Cold Water Company is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

WHEREAS, said Boise City on the 3d day of October, 1899, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said Company to the residents of said City for profit, and

WHEREAS, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

NOW, THEREFORE, BOISE CITY DOES ORDAIN AS FOLLOWS:

SECTION 1. THAT, The Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1899, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month, a monthly license of $300.00 for the privilege granted by said ordinance of October 3, 1899, to lay and repair water-pipes in the streets and alleys of said City through which water

is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. THAT demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300.00 required by Section 1 of this Ordinance.

SECTION 3. THAT, the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. THAT nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1899.

SECTION 5. THIS Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest: EMILY L. SAVIDGE,
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 678 passed by the common Council of Boise City, the 31st day of May, 1906, vetoed by

the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City, this 26th day of July, 1906.

[Seal] EMILY L. SAVIDGE,
City Clerk.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Stipulation [Re Submission of Demurrer, etc.].

It is hereby stipulated by and between the parties to the above-entitled action, through their attorneys herein:

1. That the demurrer to defendant's answer and the motion to strike out parts of said answer heretofore filed may be argued and submitted together at the hearing of said cause in Portland, Oregon, on July 12th, 1909, before Honorable William B. Gilbert, United States Circuit Judge for the Ninth

Judicial Circuit, the court having heretofore expressed its approval.

2. That the copy of the Ordinance of said Boise City No. 678, mentioned in paragraph VI of plaintiff's amended complaint, certified by the City Clerk of said Boise City on the 26th day of June, 1906, may be filed herein and used on the trial of this action, and copies of any other ordinances so certified, that counsel may desire to introduce, may be so filed in evidence.

3. That the ordinance granted by plaintiff to the Capital Water Company, mentioned in paragraph XIV of defendant's answer, was specified to continue for fifty years from the time it was passed by the city council.

F. B. KINYON,
Attorney for Plaintiff.
EDGAR WILSON and
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Opinion [Filed July 29, 1909].

FRANK B. KINYON, for the Plaintiff,

JOHNSON & JOHNSON and EDGAR WILSON, for the Defendant.

The plaintiff brings an action against the defendant alleging that on October 3, 1899, the plaintiff, by its mayor and common council, adopted an ordinance which provides as follows: "Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys, in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom"; that the ordinance granted a

license for an indefinite period, and that it was accepted by the grantees thereof; that the defendant became the successor in interest of the said H. B. and B. M. Eastman; that the defendant and its predecessors in interest are now, and ever since October 3, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff, and the residents of said city; that the plaintiff on June 7, 1906, enacted and approved an ordinance requiring the said defendant to pay plaintiff on the first day of each month, a monthly license of $300, for the use and occupancy of the streets and alleys of said city by the defendant in the sale and delivery of water to the plaintiff and the inhabitants of said city, and for the privilege granted by said ordinance of October 3, 1889; that demand has been made upon the defendant for the payment of said monthly license, but payment has been refused. Judgment was demanded for the sum of $10,130. The defendant answered, alleging that on July 10, 1890, the mayor and common council of plaintiff duly passed an ordinance granting to the Artesian Water and Land Improvement Company, a corporation and its successors and assigns, the privilege of laying down and maintaining water-pipes in the streets and alleys then laid out or thereafter to be laid out, and dedicated in said Boise City; that said corporation accepted the same and immediately proceeded thereunder with due diligence to sink artesian wells, construct reservoirs, and lay pipes under and along the streets and alleys of said city to supply it and its inhabitants with water, and therein expended over

$50,000; that the said H. B. and B. M. Eastman accepted the ordinance of October 3, 1889, laid their water mains and pipes under and along the streets of said city and up to the time they conveyed their plant to the defendant, they had expended thereon the sum of $20,000; that on March 28, 1891, the Artesian Hot and Cold Water Company, Limited, became the owner by purchase of the rights of said Eastman Brothers and of the said Artesian Water and Land Improvement Company, and since said date has supplied water to said city and its inhabitants and has improved its plant at an expense of $192,000; that on August 28, 1901, the defendant became the owner by purchase of the entire waterworks system and plant of the Artesian Hot and Cold Water Company, Limited, and since said date has supplied the plaintiff and its inhabitants with water and therein has expended $140,000, and the defendant alleges that the plaintiff and its mayor and common council have claimed and are claiming that the defendant is a mere licensee under a license which may be revoked or annulled at the will of said common council, and the defendant avers that said ordinances when accepted and acted upon by the defendant and its grantors became and are franchises and binding contracts between the plaintiff and defendant; that the defendant during the whole time of its engagement in the business of supplying water, has paid its due proportion of taxes, State, county, city and school taxes upon all its property in said city, and has charged and received water rates in accordance with the rate duly established by commission-

ers appointed under section 2711 of the Revised Statutes of Idaho, and the Act of March 9, 1905. To the answer the plaintiff demurs on the ground that the facts stated therein constitute no defense to the cause of action alleged in the complaint.

GILBERT, Circuit Judge, after stating the case.

The Circuit Court of Appeals for this Circuit had occasion to construe the ordinance of October 3, 1889, granting to the Eastman Brothers and their successors in interest in their waterworks, authority to lay and repair their water-pipes in and through the streets and alleys of Boise City, and held that since no term was specified in the ordinance for the enjoyment of the privilege so granted, it was a grant of a license only, legalizing such use of the streets for supplying water until such time as the city might see fit to terminate the privilege. Boise City Artesian Hot and Cold Water Co. v. Boise City, 123 Fed. 232. This was held under the doctrine, sustained by the decided weight of authority, that a municipal corporation has no power to grant a franchise in perpetuity unless it is expressly authorized by the legislature. 28 Cyc. 875; Logansport Ry. Co. v. Logansport, 114 Fed. 688; Detroit v. Detroit City R. Co., 56 Fed. 867; Birmingham etc. Street Ry. Co. v. Birmingham Street R. Co., 79 Ala. 465. Section 2710 of the Revised Statutes of Idaho, 1887, refering to water and canal corporations, and providing that no contract or grant must be made for a term exceeding 50 years, was not deemed applicable to the case for the reason that the Eastman ordinance was a grant of a privilege to individuals and not to a cor-

poration. In construing that section of the statutes, the Supreme Court of Idaho in Jack v. Village of Grangeville, 9 Idaho, 291, held that it had no application to individuals or natural persons. See, also, Santa Ana Water Co. v. Town of San Buena Ventura, 56 Fed. 339. But in the present case, a different question is presented, for the Court is called upon to construe the ordinance of July 10, 1890, granting to the Artesian Water and Land Improvement Company, a corporation, its successors or assigns, "The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated to Boise City." This ordinance is not more inclusive than the ordinance granting the privilege to Eastman Brothers, the predecessors in interest of the Artesian Water and Land Improvement Company, and, like that ordinance, it contains no expression of the will of the common council as to the term or duration of the granted right. The defendant contends that the omission is to be filled by reading into the ordinance the prohibition of section 2710 of the Revised Statutes that no contract or grant to a corporation "must be made for a term exceeding 50 years," and that thereby it is made a franchise for 50 years. This is the crucial question in the case, upon the answer to which depends the disposition of the demurrer.

There is a line of cases which hold that where a municipal corporation grants a franchise or enters into a contract permitting the use of its streets for a fixed period longer than that which is allowed by law, the contract is wholly void as ultra vires, and

will not be sustained for any period whatever. Thus in Sullivan v. Bailey, 83 N. W. 996, the Supreme Court of Michigan held that under a city charter conferring power on the common council to contract to supply its inhabitants with water and light, and granting the use of the streets for those purposes for a period not exceeding ten years, the common council cannot grant a franchise for the use of the streets for a longer period than ten years for those purposes, and that the grant of a franchise for thirty years was void. So in Gaslight & Coke Co. v. City of New Albany, 156 Ind. 406, under a statute which authorized the municipal corporation to make contracts for lighting its streets for a term not exceeding ten years, a franchise given by ordinance for a period of twenty years was held to be wholly invalid, and not to be allowed to stand for the ten years authorized by statute. Said the Court: "The contract here with respect to duration involves but a single proposition, a single and specific term of twenty-three years, which, from its indivisible nature, must either stand or fall as an entirety." The same was held in City of Wellston v. Morgan, 59 Ohio St. 147; Town of Kirkwood v. Meremac Highlands Co., 94 Mo. App. 637; City of Somerset v. Smith (Kentucky), 49 S. W. 456; State ex rel. Davis v. Harrison, 46 N. J. L. 79; Humphreys v. Mayor of Bayonne, 55 N. J. L. and Manhattan Trust Co. v. City of Dayton, 8 C. C. A. 140.

But it would seem that, upon principle, there is a distinction to be observed between cases where the municipality grants a franchise for a fixed period of

time in excess of that which the law permits, and cases where it grants a franchise for an indefinite period under a law which places a limit upon the life of such a franchise. In the first class of cases, there must be imputed to the municipal authorities and the contracting parties a violation of the law, and there is good ground for saying that the contract is ultra vires and wholly void, and that a Court may not lop off the excess of time so granted and hold the franchise good for the term for which it might lawfully have been given. In the second class of cases, it is reasonable to hold that there was absence of intention to disregard the law, that the franchise was granted in view of the existing statutory limitation fixed upon its life, and that the ordinance granting it being silent as to its duration, the omission is to be supplied by a reference to the statute. It is true that in Blaschko v. Wurster, 156 N. Y. 447, the Court refused to sustain as valid for the period limited by the statute a grant of a franchise for an indefinite time. In that case, the charter provided that no franchises or right to use the streets of the city could be granted for a longer period than twenty-five years. It was held that a resolution of the aldermen granting consent to a railroad company to operate in certain streets without any limitation as to time was not a valid exercise of the power to grant consent for twenty-five years, and hence was not good as a consent for twenty-five years, but was void. But in People ex rel. Flatbush Gas Co. v. Coler et al., 103 N. Y. S. 590, the court declined to follow the Blaschko case, and held that under the

Greater New York charter forbidding the grant of any franchise to use the streets for a period longer than twenty-five years, where a company has laid electric wires and furnished light to the city and others for ten years under a contract with the commissioners of parks giving it the right to do so, without limiting the time, the contract is valid for the exercise of the right for twenty-five years from its date. Referring to the decision in Blaschko v. Wurster, the court said that the franchises attempted to be granted there were clearly an attempt to evade the provisions of the Greater New York charter, which was about to go into effect, that the circumstances of the granting evidenced bad faith, and a deliberate breach of duty on the part of the authorities, and that for these reasons the contracts had been held void, and the court had refused to consider the grant good even for twenty-five years. "Like reasons, however," said the Court, "cannot apply here where the Gas Company has been operating under some kind of a franchise for ten years with the consent and approval, and for the benefit of the city." The Court of Appeals, 190 N. Y. 268, reversed the decision in People ex rel. Flatbush Co. v. Coler, solely on the ground that the common council and not the commissioner of public parks was the proper authority to give consent to the use of the streets. A case directly in point is Old Colony Trust Co. v. City of Wichita, 123 Fed. 762, affirmed by the Circuit Court of Appeals for the Eighth Circuit in 132 Fed. 641. In that case one of the questions involved was the length of the life of an ordi-

nance granting to a telephone company the right to maintain its poles and wires in the streets of a city, no term being stated in the ordinance. The Court held, and it seems to have been assumed by counsel for both parties, that the life of the privilege granted was twenty years. This was held under the provisions of General Statutes of Kansas, 1889, section 555, wherein, in defining the general powers of the mayor and council of incorporated cities, the legislature coupled the grant of power to permit the use of streets for water, light and other purposes, with the proviso that no franchise or right of way or privilege of any character should be granted for a longer period than twenty years.

It is not reasonable to suppose that the City of Boise intended to grant as a mere license, subject to recall at any time, a privilege such as that which is embodied in the ordinance under consideration, or that the grantee thereof would have accepted it on that understanding, or on that understanding would have incurred the expense of installing its water plant. The conclusion that it was in law such a license, should be reached by a Court only when confronted with the alternative of choosing between the two constructions, one that it is a mere license, the other that it is a grant in perpetuity. It was in the face of that alternative that the Court in Boise City Artesian Hot and Cold Water Co. v. Boise City held that the grant of the Eastman Brothers must, in law be deemed a license. Upon a careful consideration of the question here involved, and the authorities applicable thereto, and in view of the fact that the privilege so

granted is not exclusive and does not stand in the way of the city's granting like privileges to others, or instituting its own water plant and supply, I am inclined to the opinion that the ordinance under consideration, having been accepted and acted upon by the grantee and its successors, creates a franchise for fifty years, which may not be impaired by the imposition of a license tax upon the use of the streets for the purposes for which it was so created, and that the demurrer should be overruled.

[Endorsed]: Filed, July 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Order [on Motion to Strike].

This cause having been submitted upon a motion to strike out portions of the answer, and upon a demurrer to the answer, the plaintiff appearing by Frank B. Kinyon, its attorney, and the defendant appearing by Johnson & Johnson and Edgar Wilson, its attorneys, the Court being now fully advised in the premises,—

It is ordered, that the said motion be allowed as to that portion thereof directed to paragraphs 8 and 14 of said answer, and as to the remainder thereof disallowed, and that the demurrer be, and is hereby overruled.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: Filed July 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LTD. (a Corporation),

Defendant.

Opinion [Filed April 1, 1910].

F. B. KINYON, City Attorney of Boise City,
CAVANAH & BLAKE, for the Plaintiff.
JOHNSON & JOHNSON, for the Defendant.

GILBERT, Circuit Judge:

By the stipulation of the parties, this case is submitted for trial without a jury, and for judgment upon the pleadings and an agreed statement of the facts. The action is brought by the plaintiff to recover certain license fees charged against the defendant for the use and occupancy of the streets and alleys of the city in the sale and delivery of water to

the plaintiff and its inhabitants, under an ordinance approved on June 7, 1906. The defendant denied its liability on the ground that on July 10, 1890, the mayor and common council of the plaintiff had, by ordinance, granted to the defendant's predecessor in interest, a corporation, and to its successors and assigns, the privilege and franchise of laying down and maintaining water-pipes in the streets and alleys then laid or thereafter to be laid out and dedicated in the city, and that the franchise had been accepted and acted upon and used in compliance with its terms, and among other matters pleaded in defense, the defendant alleged that on May 11, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and the Act approved March 6, 1905, amendatory thereof, two commissioners were appointed by the mayor and common council of the plaintiff, and two commissioners were thereafter appointed by the defendant for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City. That said commissioners duly met and organized and adopted a schedule of rates to be charged by the defendant for all of said purposes as required by said statute, which schedule was adopted upon consideration and investigation of the value of the defendant's waterworks plant and reasonable operating expenses and deterioration thereof, as fixed rates to be charged the said city and its inhabitants at figures which were intended to yield to the defendant a net return of six per cent per annum upon the then value of its plant, and that said rates have not, up to the present time,

and will not in the future, to the best of defendant's information and belief, yield the defendant any greater net return. That the said rates so adopted went into effect on August 1, 1905, and were accepted by both plaintiff and defendant, and ever since have been and now are in full force and effect, and will continue in force until new rates are established, and that the defendant has at all times acquiesced in said rates. A demurrer to the answer was interposed on the ground that the right so granted was a license merely, revokable at the will of the grantor, for the reason that no period for its duration had been expressed in the ordinance, and that the facts stated in the answer constituted no defense to the cause of action alleged in the complaint. It was held upon the demurrer that section 2710 of the Revised Statutes of Idaho, 1887, referring to water and canal corporations, and providing in general terms that "no contract or grant must be made for a term exceeding fifty years," was to be referred to as determining the length of life of the franchise, and that the term of fifty years so fixed, should be read into the ordinance as a part thereof.

The plaintiff now directs attention to a decision of the Supreme Court of Idaho of date February 18, 1909, Boise City Nat. Bank v. Boise City, 100 Pac. 93, the effect of which, it is said, is to hold that a general statute of the state, such as that embodied in section 2710 has no application to a city incorporated under a special charter. The question involved in that case was whether the act of the legislature of February 24, 1905, which was an act to provide for

the issuance of bonds for improvements of streets and laying of sewers in incorporated cities, towns and villages, and for the payment of costs of such improvement and sewers, by installments, and making the provisions thereof applicable to cities, towns and villages which have levied special assessments for improvements or for laying sewers, was a statute which in any way controlled or related to the action of the officials of Boise City in issuing local improvement bonds for sewer districts. It was held that it did not, and that the action of the officials of Boise in issuing such bonds was controlled only by the special charter of Boise City, as amended on February 22, 1907, wherein was provided a complete system for building sewers, assessing the property benefited, and collecting from the property owners the cost thereof, which method the act declared should be exclusive. And the Court held that, while the Act of 1907, contained no repeal of any of the provisions of the Act of 1905, and was not as full and complete as it ought to be in regard to the making of improvements, and the Act of 1905 was not inconsistent with it, but merely went further and gave additional powers, yet the omission was nevertheless intentional, that the provisions of the general law of 1905 had no application to the new charter, but applied to cities and towns organized under a general law and not to those organized under special charters, that the State constitution contemplates that special charter shall be amended by special acts only, and that the general laws relating to the local government of a city cannot be made to apply to Boise City with-

out the consent of a majority of the electors. I am unable to see that the decision has any appreciable bearing upon the question here involved. Section 2710 of the Revised Statutes of 1887 is not a statute defining the powers of incorporated cities, towns and villages, but is a general statute of the state, declaring a rule of public policy with reference to all canal and water corporations of the state, limiting the life of the contracts which may be made with them for the supply of water for the use of incorporated towns and cities of the state. It is found in the statutes under the title "Corporations," a title which deals with the powers and the regulation of railroad companies, telegraph and telephone companies insurance companies, surety and fidelity companies, banking corporations, gas corporations, and all other kinds of incorporated companies. It declares: "No corporation formed to supply any city or town with water, must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years." The State constitution provides that the right to collect rates or compensation for the use of water supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of, and in the manner prescribed by law." It cannot

be doubted that section 2710 applies to all water companies in their contracts with all municipal corporations, whether the latter are incorporated under the general law or under a special charter, and contains the whole expression of the legislative will on the subject. It expressly limits the power of all municipal corporations to deal with water companies. No water company may furnish water to a town or city, under whatever authority incorporated, unless previously authorized by an ordinance, or a contract, and to no such corporation can any exclusive right be granted, or any right for a longer period than fifty years. No legislation on the subjects so referred to is found in the general laws providing for the incorporation of towns and cities or in the charter of Boise City. Section 2711 provides that a water company receiving and accepting the privileges conferred by section 2710, shall furnish a city or town water for fire purposes and other great necessities, free. In the City of Boise v. Artesian Hot & Cold Water Co., 4 Idaho, 351, a suit brought under sections 2711 and 2712, to compel the defendant to furnish the city with free water for fire purposes, the court expressly recognized the applicability of section 2710 to the City of Boise, and held that the plaintiff's complaint must set forth substantially the ordinance or contract with the city, permitting the company to furnish the water, and regulating the manner thereof as provided in that section. The decision, in brief, distinctly holds that the provisions of the chapter referring to water and canal corporations is appli-

cable to the city of Boise, and I deem it a controlling decision upon the question here under consideration.

Judgment will be rendered for the defendant.

[Endorsed]: Filed April 1, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY LIMITED (a Corporation),

Defendant.

Findings of Fact and Conclusions of Law.

This action coming regularly on for trial, before the Court, without the intervention of a jury, a stipulation in writing waiving a jury having been filed with the clerk by the attorneys for the respective parties, F. B. Kinyon, Esq., City Attorney of plaintiff and Messrs. Cavanah and Blake, appearing as the attorneys for the plaintiff, and Messrs. Johnson & Johnson, appearing as attorneys for the defendant, and stipulations containing an agreed statement of the facts having been filed and the case having been argued by the attorneys for the respective parties and submitted to the court for judgment upon the stipulations of fact and the pleadings and the Court, having duly considered the same, and being fully

advised in the premises and having heretofore, on the first day of April 1910, rendered and filed its opinion in writing herein:

Now, in accordance therewith the Court hereby makes and renders its decision, finding the following facts and conclusions of law herein:—

Findings of Fact.

I.

The plaintiff, Boise City, is now, and at all times herein mentioned, was, a municipal corporation within Ada County, Idaho, created by and existing under the laws of Idaho and operating under a special charter, granted by the Legislature of the Territory of Idaho in the year 1863, and subsequent amendments thereto.

II.

That the defendant is a private corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho, and is authorized and empowered by its articles of incorporation to carry on and conduct a waterworks system and to sell and rent water to the inhabitants of the said Boise City, and to take, purchase, acquire, hold, operate and maintain rights and privileges of water companies, associations or corporations, and to acquire, use, own and operate all properties, franchises, rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be the successors in every respect of said corporation, and its charter provides that its period of

existence shall be fifty years from and after the date of its incorporation, or to and until September 1, 1950.

That the defendant, within three months from the time it commenced to do business in the State of Idaho, to wit, on the 4th day of September, 1901, designated B. S. Howe, a person residing in Ada County, Idaho, the County in which its principal place of business in Idaho is conducted, upon whom process issued by authority of or under any law of said State, might be served, and on said last named date filed such designation in the office of the Secretary of State of Idaho and in the office of the Clerk of the District Court of said County of Ada, and within three months after taking effect of the act of the Legislature of Idaho, approved March 10, 1903, relating to foreign corporations, it filed with the County Recorder of said County of Ada, a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said County Recorder, with the Secretary of State of Idaho, and all of said designations have ever since remained and now are in full force and said copies have ever since remained and are now on file in said offices.

III.

That on the 3d day of October, 1889, said plaintiff, Boise City, by its Mayor and Common Council, passed and adopted the following ordinance, to wit:

"An Ordinance Granting Eastman Brothers the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Section 2. This Ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889."

IV.

That the plaintiff, Boise City, on the 10th day of July, 1890, by its Mayor and Common Council, passed and adopted the following ordinance, to wit:

"An Ordinance Granting to the Artesian Water and Land Improvement Company the right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the

Artesian Water and Land Improvement Company, its successors or assigns.

Section 2. All water-pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

Section 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890."

V.

That the said Artesian Water and Land Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying plaintiff and its inhabitants with water for public and family use.

VI.

That after the passage and approval of the Ordinance mentioned in Finding III hereof, the said Eastman Brothers proceeded immediately to construct a waterworks plant and system consisting of artesian wells and reservoirs and laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its inhabitants with pure mountain water in accordance with said ordinance.

That up to the time said Eastmans sold and conveyed their waterworks plant and rights to the Artesian Hot and Cold Water Company, Limited, they had expended in the construction thereof over Twenty Thousand Dollars.

VII.

That after the passage and approval of the

ordinance mentioned in Finding IV the said Artesian Water and Land Improvement Company proceeded immediately thereunder to sink artesian wells, construct reservoirs and lay pipes under and along plaintiff's streets and alleys and to supply plaintiff and its inhabitants with pure, fresh water for municipal, domestic and irrigation purposes.

That up to the time this company sold and conveyed its waterworks and property to the Artesian Hot and Cold Water Company, Limited, it expended in the construction, extension and improvement thereof over Fifty Thousand Dollars.

VIII.

That the Artesian Hot and Cold Water Company, Limited, was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations and was authorized by its articles of incorporation to supply plaintiff and its inhabitants with water for municipal and domestic uses and to purchase and acquire the waterworks, wells, reservoirs, pipe-lines, properties, rights and franchises of the said Eastman Brothers and said Artesian Water and Land Improvement Company.

IX.

That on the 28th day of March, 1891, the said Eastman Brothers and the said Artesian Water and Land Improvement Company sold and conveyed to said Artesian Hot and Cold Water Company, Limited, each of their waterworks systems and all property belonging thereto and all rights, privileges and

franchises granted to them respectfully by the ordinances set forth in Findings III and IV.

X.

That on the 28th day of August, 1901, the said Artesian Hot and Cold Water Company, Limited, sold and conveyed to the defendant its entire water-works systems and plant, including all of its wells, reservoirs, pumping plants, pipe-lines, pipes, real and personal property of every nature, and also all of the rights, privileges and franchises which had been granted to it and to its predecessors in interest by the Ordinances of Boise City.

XI.

That during the time between the 28th day of March, 1891, and the 28th day of August, 1901, the said Artesian Hot and Cold Water Company, Limited, supplied plaintiff and its inhabitants with pure, fresh water for municipal, domestic and other useful purposes, and during said time the population of Boise City increased from about three thousand to about six thousand inhabitants, and the area thereof was greatly enlarged by the laying out and platting of additions thereto, which were settled upon and occupied, and during said period said Artesian Hot and Cold Water Company, Limited, with plaintiff's knowledge and consent, extended its pipe-lines under the streets and alleys of said city, from time to time, and supplied said additions with water to meet the demands therefor. That during said period said Company laid about fifteen miles of additional pipe-lines for cold water supply,

constructed two wells and one reservoir for cold water, erected a large steam pumping plant with a capacity of three million gallons per day and made improvements to its cold water plant aggregating in cost more than one hundred and ninety-two thousand dollars.

XII.

That at all times since said 28th day of August, 1901, this defendant has supplied to plaintiff and its inhabitants, by virtue of said ordinances and laws, and with plaintiff's knowledge, acquiescence and consent, pure, fresh water for municipal, domestic and other useful purposes in accordance with said ordinances and in full compliance therewith and with said laws of Idaho. That since said last-named date the population of Boise City has increased from about six thousand to over twenty-five thousand inhabitants, and this defendant, with plaintiff's knowledge, acquiescence and consent, has extended its cold water system to meet the growth of said city and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system an additional sum of more than one hundred and forty thousand dollars.

XIII.

That the defendant and its predecessors in interest in and to its waterworks system are now, and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff and residents and inhabitants of Boise City, through the water mains of said waterworks systems, and in the laying and repairing of said water-pipes connected with said waterworks systems.

XIV.

That the plaintiff, Boise City, on the 7th day of June, 1906, enacted and approved an ordinance of said City, No. 678, as follows, to wit:

"An Ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation, organized and existing under *the* by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

Whereas, Boise City, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

Whereas, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

Whereas, said Boise City, on the 3d day of October, 1889, approved an ordinance granting to H. B.

Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

Now, therefore, Boise City does ordain as follows:

Section 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

Section 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300 required by Section 1 of this Ordinance.

Section 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

Section 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

Section 5. This Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2d, 1906.

Passed over the Mayor's veto June 7th, 1906, by a vote of 8 Ayes; 3 Noes."

XV.

That the whole number of the members of the Common Council of the plaintiff, Boise City, on the 7th day of June, 1906, was twelve members and that said Ordinance No. 678, after the same was vetoed by the Mayor of the plaintiff on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the Common Council of said Boise City, over the veto of said Mayor, by a two-thirds vote cast by the Common Council of said Boise City.

XVI.

That the City Clerk of said Boise City duly notified the said defendant of the requirements of said

Ordinance No. 678, and from and after the enactment of said Ordinance No. 678, and until this action was begun, did on the first day of each and every month, demand of said defendant the payment of said monthly license of three hundred dollars, required by said Ordinance, but the said Defendant refused on the first day of each and every month after the enactment and approval of said Ordinance No. 678 until the beginning of this suit and still refuses and neglects to pay said monthly license, or any part thereof, to said Boise City.

XVII.

That on the 6th day of December, 1906, the plaintiff by its mayor and common council, passed and approved Ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any court of competent jurisdiction, against the said defendant for the enforcement of the provisions of said Ordinance No. 678 and the collection from said defendant of the sum of money due said Boise City from said defendant under the provision of said Ordinance No. 678.

XVIII.

That all of the aforesaid ordinances are now, and ever since their said passage and approval, have been in full force and effect.

XIX.

That since the passage of said ordinance mentioned in Finding XIV, said plaintiff and its common council have claimed that the ordinances set

forth in the findings III and IV, were and are mere licenses which may be revoked or annulled at the will of said common council, and that said common council may compel this defendant to discontinue its business of supplying water and of using said streets and alleys therefor or subject it to the payment of the license fee or any other burdens for such privilege.

XX.

That each and every year since this defendant and its grantors have been engaged in the business of supplying water, their waterworks and all property, both real and personal, owned by them in the Territory and State of Idaho, have been duly assessed for payment of all State and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof, as all other property in said Boise City, and this defendant and its predecessors in interest have each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against their property.

XXI.

That on the 11th day of May, 1905, two commissioners were appointed by the mayor and common council of the plaintiff, Boise City, and two commissioners were thereafter appointed by the defendant, for the purpose of fixing and determining the rates to be charged by the defendant for water for domestic, municipal and other purposes in said Boise City. That said commissioners met and adopted a schedule of rates to be charged by de-

fendant for all purposes mentioned in section 2711 of the Revised Statutes of Idaho, and the act approved March 9, 1905, amendatory thereof. That the rates so adopted were intended to yield to defendant a net return of six per cent per annum upon the then value of defendant's waterworks plant, and that such rates have not and will not yield to defendant a greater return. That the said rates so fixed by said commission were, after August 1, 1905, and still are charged by defendant for water and that defendant has, at all times, acquiesced in the rates so fixed and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said Commission in fixing said rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission.

XXII.

That the Eastman Brothers and the Artesian Water and Land Improvement Company and the defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys and no pecuniary consideration therefor was ever demanded or required by said plaintiff therefor, prior to the passage of Ordinance No. 678 set forth in Finding XIV.

XXIII.

That the amount in controversy in this action, exclusive of interest and costs, exceeds the sum or value of Two Thousand Dollars.

Conclusions of Law.

As conclusions of law the Court finds:

I.

That the ordinance of July 10, 1890, to the Artesian Water and Land Improvement Company, a corporation, its successors or assigns, was granted in view of the limitation of fifty years, fixed upon its duration by section 2710 of the Revised Statutes of Idaho, and is not a mere license subject to recall at any time, and that this ordinance, having been accepted and acted upon by the grantee and its successors, creates a franchise for fifty years.

II.

That the imposition of the license tax set forth in Finding XIV is an impairment of such franchise and is, therefore, void.

III.

That the defendant is entitled to judgment with costs of suit.

Let judgment be entered in accordance herewith.

Dated April 20, 1910.

WM. B. GILBERT,
Judge.

[Endorsed]: Filed April 22, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (A Corporation),

Defendant.

Judgment.

This cause coming on regularly for hearing before the Court, a jury trial having been expressly waived by stipulation in writing filed herein, upon the pleadings, proofs taken and stipulations filed herein, F. B. Kinyon, Esq., and Messrs. Cavanah & Blake appearing as attorneys for the plaintiff, and Richard H. Johnson, Esq., appearing as attorney for the defendant, and the same having been argued and submitted to the Court for consideration and decision, and the Court after due deliberation, having filed its findings and decision in writing, and ordered that judgment be entered herein in accordance therewith;

Now, therefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff take nothing by this action, and that the defendant do have and recover of and from said plaintiff, its costs and disbursements herein, amounting to the sum of $22.20.

Judgment entered April 26, 1910.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, do hereby certify that the above and foregoing is a true and correct copy of the Judgment in the above-entitled cause, entered in Judgment Book No. 1 of said court, at page 421.

Witness my hand and the seal of said court this 26th day of April, 1910.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed Apr. 26, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (A Corporation),

Defendant.

Bill of Exceptions.

Be it remembered that on the 12th day of January, 1910, this cause came on for trial in said court before the Honorable William B. Gilbert, the Judge presiding, F. B. Kinyon, Esq., and Cavanah & Blake, appearing as counsel for the plaintiff, and Johnson & Johnson, appearing as counsel for the defendant. A jury having been heretofore expressly waived by

both parties the trial was had before the Court, whereupon said parties filed their agreed stipulation of facts, which are as follows:

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (A Corporation),

Defendant.

Stipulation of Facts [First—in Bill of Exceptions].

It is hereby stipulated by and between the parties to the above-entitled action by their attorneys herein that the following shall constitute a statement of the facts agreed upon in said action to be used on the final trial hereof before the Court, a jury being expressly waived herein.

1. The first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of plaintiff's amended complaint are admitted.

2. All of the third allegation of said complaint is admitted except that portion thereof on the fourth and fifth lines of said allegation, which states that said ordinance is "a license for an indefinite period."

3. That the first, seventh and eighth allegation of defendant's answer to said amended complaint are hereby admitted to be true.

4. That the sixth allegation of defendant's said answer, including Exhibit "A" therein referred to,

is hereby admitted to be true, but plaintiff does not admit that the ordinances referred to in said allegation were passed by the common council of plaintiff under authority of the general laws of Idaho.

5. That the ninth and tenth allegations of defendant's said answer are hereby admitted to be true, but plaintiff does not admit that the ordinances mentioned in said allegations and in the said sixth allegation are franchises or that defendant furnished such water under authority of or in accordance with the laws of Idaho, or that such laws apply to the furnishing of water in Boise City, but plaintiff admits that the defendant and its predecessors in interest, in furnishing such water, complied with all conditions and requirements contained in such laws, and plaintiff reserves its objection as to the admissibility of the facts set forth in the said ninth and tenth allegations on the ground that they are irrelevant, incompetent and immaterial and no defense to the action.

6. As to the eleventh allegation of said answer, plaintiff admits that after the passage of said ordinances purporting to give the rights to use the streets and alleys of said city, the predecessors of said defendant proceeded to lay their pipes and supply said water, and that defendant and its said predecessors in interest have ever since continued so to do by reason of the passage of said ordinances, and that since the passage of said ordinance mentioned in the sixth allegation of said complaint, said plaintiff and its common council have claimed that said ordinances were and are revocable licenses, as alleged in said eleventh allegation of said answer.

7. The twelfth allegation of said answer is hereby admitted to be true, but plaintiff reserves the objection that the facts therein stated are immaterial, irrelevant and incompetent and not a defense to the action.

8. As to the thirteenth allegation of said answer, plaintiff admits the appointment of the commissioners, and that they met and adopted a schedule of rates to be charged by defendant for all purposes mentioned in said allegation, and that said rates were intended to yield the net return of six per cent mentioned therein, and that they do not now and will not yield a greater return, and that the said rates so fixed by said commission were, after August 1, 1905, and still are, charged by defendant for water, and that defendant has at all times acquiesced in the rates so fixed, and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said commission in fixing said rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission, as set forth in said thirteenth allegation of said answer, but plaintiff does not admit that the statutes referred to in said allegation have application to the appointment of commissioners in said Boise City, or that they could be legally appointed pursuant to said statutes.

9. That the fourteenth allegation of said answer is hereby admitted to be true and it is stipulated that the franchise to the Capital Water Company mentioned therein is, by its terms, limited to endure for

a period of fifty years, and plaintiff reserves its legal objection that said franchise was not granted under the laws of Idaho therein referred to, and that the facts stated in said thirteenth and fourteenth allegations are irrelevant, incompetent and immaterial and not a defense to the action.

10. It is admitted that the said Eastman Brothers and the said Artesian Water and Land Improvement Company and said defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys, and that no pecuniary consideration therefor was ever demanded or required by said plaintiff therefor, prior to the passage of said ordinance No. 678, which is hereto attached, marked Exhibit 1, and admitted in evidence.

11. It is admitted that plaintiff has made due and proper demand upon defendant for the payment of the amount prayed for in said complaint and that defendant has paid no part thereof.

It is hereby stipulated by counsel in the above-entitled action that the defendant has furnished water to plaintiff as shown in the annexed statement, during the year 1909, and paid the defendant the amounts thereon stated.

That the city council of plaintiff in the month of December, 1909, by resolution directed defendant company to install fire hydrants for use by the city fire department on the defendant mains as follows: On the corner of North 17th and Sherman Streets; North 19th and Sherman Streets; North 17th and Brumback Streets; North 21st and Resseguie Streets; and West State and 19th Streets.

That the plaintiff reserves its objection to the admissibility of the above facts on the ground that they are irrelevant, immaterial and incumbent and not a defense to this action.

AMOUNT PAID BY CITY OF BOISE TO THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, from January 1st, 1908, to December 1, 1909.

Date Paid.	Domestic Use.	Flushing Sewers.	Street Sprinkling.	Heating.
1908.				
January 4th	45.55	348.30	880.80	
February 8	30.40	177.55		
March 7	23.05	176.40		
April 6	24.55	176.40		
June 6	45.15	307.45		
August 10	50.24	94.60		
Sept. 10	29.66	47.30		
Oct. 6	30.03	47.30		
Nov. 7	31.16	47.30	3,300.00	
Dec. 5	26.00	47.30		500.00
1909.				
January 6			354.46	
March 8	69.80	140.82		
May 10	32.60	47.30		
June 9	36.60	47.30		
July 6	40.55	47.30		
August 18	49.75	47.30		
Oct. 4	67.50	94.60	2,000.00	
Nov. 7	57.00	47.30		337.00
Dec. 4	38.25	47.30	1,763.84	
	$727.84	$1,989.12	$8,299.10	$837.50

Summary:

Cold water for	domestic use	$	727.84
" " "	sewer flushing		1,989.12
" " "	street sprinkling		8,299.10
Hot " "	Heating City Hall		837.50
	Total	$	11,853.56

Filed Oct. 23rd, 1909.

FRANK B. KINYON and
CAVANAH & BLAKE,
Attorneys for Plaintiff.
JOHNSON & JOHNSON,
Attorneys for Defendant.

Ordinance No. 678.

By Councilman Davis.

AN ORDINANCE REQUIRING THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, A PRIVATE CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF WEST VIRGINIA, TO PAY TO BOISE CITY A MUNICIPAL CORPORATION OF THE STATE OF IDAHO ON THE FIRST DAY OF EACH AND EVERY MONTH, A MONTHLY LICENSE OF $300.00 FOR THE USE AND OCCUPANCY OF THE STREETS AND ALLEYS OF SAID CITY.

WHEREAS, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

WHEREAS, The Boise Artesian Hot and Cold Water Company is a private corporation, organized, existing and operating under the laws of the State of West Virginia, and,

WHEREAS, said Boise City on the 3d day of October, 1899, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city for profit, and,

WHEREAS, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

NOW, THEREFORE, BOISE CITY DOES ORDAIN AS FOLLOWS:

SECTION 1. THAT, The Boise Artesian Hot and Cold Water Company, a private corporation organized under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1899, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300.00 for the privilege granted by said ordinance of October 3, 1899, to lay and repair water-pipes in the streets and alleys of said City through

which water is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. THAT, Demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month, said monthly license of $300.00 required by Section 1 of this ordinance.

SECTION 3. THAT, The City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. THAT, Nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1899.

SECTION 5. THIS Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31 day of May, 1906.

Vetoed by the Mayor June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest: EMILY L. SAVIDGE,
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 678, passed by the Common Council of Boise City, the 31st day of May, 1906, vetoed

by the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City this 26th day of July, 1906.

[Seal] EMILY L. SAVIDGE,
City Clerk.

Specifications of Error.

Plaintiff specifies the following as errors made by the Court, and will urge the same as grounds why the judgment should be reversed:

I.

That the evidence showed that the plaintiff was entitled to recover.

II.

That the evidence showed that the plaintiff was entitled to recover, in that it appeared from the evidence and particularly from the ordinance No. 94, set forth in paragraph three of plaintiff's amended complaint, and from Exhibit "A" attached to defendant's amended answer, which granted to the defendant's predecessors in interest the privilege of laying down, repairing and maintaining water-pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claims the right to the use of the streets and alleys of Boise City for the purpose of laying down, repairing and maintaining its water-pipes, do not provide for the length of time such privilege was to be enjoyed.

III.

That the evidence showed that the plaintiff was entitled to recover from the defendant, for the reason

that it appears from said Ordinance No. 678, herein set forth, that the defendant is required to pay plaintiff a monthly license for the use and occupancy of the streets and alleys of Boise City for the sale and delivery of water to the plaintiff and the inhabitants of Boise City through the water-pipes laid by the defendants in the streets and alleys of said Boise City.

IV.

That the judgment is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence that the only right which the defendant had was a mere license to use the streets and alleys of Boise City which was revocable at the will of said city.

FRANK B. KINYON and
CAVANAH & BLAKE,
Attorneys for the Plaintiff, Residing at Boise, Idaho.

The above and foregoing bill of exceptions is hereby presented for settlement by counsel for plaintiff, as their bill of exceptions in said cause.

FRANK B. KINYON and
CAVANAH & BLAKE,
Attys. for Plaintiff, Residing at Boise, Idaho.

Service of copy of foregoing Bill of Exceptions is admitted this 4th day of May, 1910.

JOHNSON & JOHNSON,
Attys. for Defendant.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant in the

above-entitled cause, that the foregoing may be allowed and settled as the bill of exceptions in said cause, and that the same may be settled and allowed by the Judge before whom said cause was tried, either in the State of California or the State of Oregon.

FRANK B. KINYON and
CAVANAH & BLAKE,
Attys. for the Plaintiff.
JOHNSON & JOHNSON,
Attys. for the Defendant.

[Order Allowing, etc., Bill of Exceptions.]

Now that the foregoing matters may be made a part of the record, the undersigned, Judge of the Circuit Court, of the Ninth Circuit, being the Judge before whom said cause was tried upon stipulation of the attorneys for the respective parties herein does hereby allow, settle and sign within the time allowed by law *and* foregoing bill of exceptions, and orders the same to be filed.

WM. B. GILBERT,
Judge.

[Endorsed]: Filed May 13, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named plaintiff, by its attorneys, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United States Circuit Court, for the Ninth Judicial District of the District of Idaho, Central Division, against said plaintiff on the 27th day of April, 1910, manifest error hath happened to the great damage of the said plaintiff.

Wherefore, plaintiff prays that a writ of error *may issued* in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in

this case, duly authenticated, be sent to the said Court of Appeals.

Dated May 27, 1910.

CAVANAH & BLAKE,

Attorneys for the Plaintiff, Residing at Boise, Idaho.

[Endorsed]: Filed May 28, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely in its prosecution of writ of error in the above-entitled cause:

I.

That the evidence showed that the plaintiff was entitled to recover.

II.

That the evidence showed that the plaintiff was entitled to recover in that it appeared from the evi-

dence, and particularly from Ordinance No. 94, set forth in paragraph 3 of plaintiff's amended complaint, as follows, to wit:

ORDINANCE NO. 94.

AN ORDINANCE GRANTING TO EASTMAN BROTHERS THE RIGHT TO LAY WATER-PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, I. T., ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damage done by them or their pipes or by water escaping therefrom.

Section 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3rd day of October, 1889.

Approved:

JAMES A. PINNEY,
Mayor.

[Seal] Attest: C. S. McCONNELL,
City Clerk.

And from Exhibit "A" attached to defendant's amended answer, which is as follows:

"EXHIBIT A."

AN ORDINANCE GRANTING TO THE ARTESIAN WATER AND LAND IMPROVEMENT COMPANY THE RIGHT TO LAY WATER-PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, Idaho, do ordain:

Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated to Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

Section 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

Section 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

Which granted to defendant's predecessors in interest the privilege of laying down, repairing and maintaining water-pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claimed the right to the use of the streets and alleys of Boise City for the purpose of laying down, repairing and maintaining its water-pipes, do not provide the length of time such privilege can be enjoyed.

III.

That the evidence showed that the plaintiff was

entitled to recover from the defendant for the reason that it appears from Ordinance No. 678, which is as follows:

ORDINANCE #678.

By Councilman Davis.

AN ORDINANCE REQUIRING THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, A PRIVATE CORPORATION ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF WEST VIRGINIA TO PAY TO BOISE CITY, A MUNICIPAL CORPORATION, OF THE STATE OF IDAHO ON THE FIRST DAY OF EACH AND EVERY MONTH, A MONTHLY LICENSE OF $300.00 FOR THE USE AND OCCUPANCY OF THE STREETS AND ALLEYS OF SAID CITY.

WHEREAS, Boise City is a municipal corporation, organized and existing under and by virtue of the laws of the State of Idaho; and,

WHEREAS, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia; and,

WHEREAS, said Boise City on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city for profit; and,

WHEREAS, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman, in and to said waterworks.

NOW THEREFORE, BOISE CITY DOES ORDAIN AS FOLLOWS:

SECTION 1. THAT the Boise Artesian Hot and Cold Water Company, a private corporation organized under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman, in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300.00, for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said City through which water is being furnished to the inhabitants of said Boise City by said company.

SECTION 2. That demand is hereby made by said Boise City of and from the said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300.00 required by Section 1 of this Ordinance.

SECTION 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company, of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid ordinance of October 3, 1889.

SECTION 5. This ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor, June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest: EMILY L. SAVIDGE,
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true copy of Ordinance No. 678 passed by the common council of Boise City, the 31st day of May, 1906, vetoed by the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, of record and on file in this office.

Given under my hand and the seal of Boise City, this 26th day of July, 1906.

[Seal] EMILY L. SAVIDGE,
City Clerk.

Which ordinance was passed and approved on June 7th, 1906, and is still in force and effect and ever since has been in full force and effect in said Boise City, Idaho, that the defendant is required to pay the plaintiff a monthly license for the use and occupancy of the streets and alleys of said Boise City for the sale and delivery of water to the plain-

tiff and the inhabitants of said Boise City through water-pipes laid by defendant in the streets and alleys of said Boise City.

IV.

The Court erred in rendering judgment for the defendant for the reason it appears from Ordinances No. 94 and Exhibit "A" above referred to, that defendant had but a mere license to the use of the streets and alleys of Boise City revocable at any time at the option of said City.

V.

That the judgment is not sustained by the pleadings.

VI.

That the trial court erred in entering a judgment in favor of the defendant and against the plaintiff.

VII.

That the Court erred in overruling plaintiff's demurrer to defendant's amended answer.

Wherefore, plaintiff and appellant prays that the judgment of said court be reversed.

FRANK B. KINYON and
CAVANAH & BLAKE,

Attorneys for the Plaintiff, Residence and Postoffice Address, Boise, Idaho.

[Endorsed]: Filed May 4, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corp.),

Defendant.

Stipulation [Waiving Filing of Bond on Writ of Error].

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled cause that the filing of a bond on the writ of error herein is waived and no bond or undertaking need be filed.

Dated May 4th, 1910.

FRANK B. KINYON and
CAVANAH & BLAKE,
Attorneys for Plaintiff.
RICHARD H. JOHNSON,
Attorney for Defendant.

[Endorsed]: Filed May 4, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho,

Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),

Defendant.

Order Allowing Writ of Error, etc.

It is hereby ordered that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein;

And it appearing that the parties in the above-entitled cause have filed a stipulation waiving bond on said writ of error. It is hereby ordered that no bond herein need be filed.

Dated this 2d day of June, 1910.

WM. B. GILBERT,

Judge.

[Endorsed]: Filed June 4, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation,
Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corp.),
Defendant.

Praecipe for Transcript.

To A. L. Richardson, Clerk of the Above-entitled Court:

You are hereby notified that we have filed a petition for writ of error in the above-entitled cause to the Circuit Court of Appeals, Ninth Circuit, which petition has been granted by the Honorable William B. Gilbert, before whom said cause was tried, and we desire that you prepare a transcript of the proceedings in said cause, which transcript shall include all papers filed therein, together with all proceedings had in said cause, except the original complaint and summons filed and issued out of the District Court of the Third Judicial District of the State of Idaho in Ada County.

June 10th, 1910.

Very respectfully,
FRANK B. KINYON and
CAVANAH & BLAKE,
Attys. for the Plaintiff.

[Endorsed]: Filed June 10, 1910. A. L. Richardson, Clerk.

[Writ of Error (Original).]

The United States Circuit Court of Appeals, for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the Circuit Court of the United States, for the District of Idaho, Central Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between Boise City, a municipal corporation, as plaintiff, and The Boise Artesian Hot and Cold Water Company, Limited, a corporation, as defendant, a manifest error hath happened, to the great damage of the said Boise City, a municipal corporation, plaintiff, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, Cal., in said circuit, within

thirty days from the day of signing the citation, in said Circuit Court of Appeals, to be *then there* held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 4th day of June, in the year of our Lord, one thousand nine hundred and ten.

[Seal] A. L. RICHARDSON,
Clerk U. S. Circuit Court for the District of Idaho.

[Endorsed]: No. 310. Circuit Court of the United States, District of Idaho, Central Division. Boise City, vs. Boise Artesian Hot and Cold Water Company, Ltd. Writ of Error. Filed June 4, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States, for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation,
Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),
Defendant.

Citation [Original].

United States of America,—ss.

The President of the United States to The Boise Artesian Hot and Cold Water Company, Limited. And Johnson & Johnson, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein Boise City, a municipal corporation is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment of the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of Supreme Court of the United States of America, this 4th day of June, 1910, and of the Independence of the United States the one hundred and thirty-fourth.

WM. B. GILBERT,

United States Circuit Judge Presiding in the Circuit Court for the District of Idaho, Central Division.

[Seal] Attest: A. L. RICHARDSON,

Clerk.

Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 10th day of June, 1910.

JOHNSON & JOHNSON,
Attys. for Defendant in Error.

[Endorsed]: No. 310. Circuit Court of the United States, Dist. of Idaho, Central Division. Boise City vs. Boise Artesian Hot and Cold Water Co. Citation. Filed on return June 10, 1910. A. L. Richardson, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Certificate of Clerk U. S. District Court to Record.]

In the Circuit Court of the United States in and for the District of Idaho.

BOISE CITY, a Municipal Corporation,
Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation),
Defendant in Error.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 107, inclusive, contain true and correct copies of the Amended Complaint, Petition for Removal, Bond on Removal, Order of Removal, Clerk's Certificate with Record, Stipulation, Answer to Amended Complaint, Motion to Strike, Demurrer to Answer, Ordinance No. 699, Stipulation of Facts, Stipulation, Opinion filed July 29, 1909, Order, Opinion filed April 1, 1910, Findings of Fact and Conclusions of Law, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Error, Stipulation, Order Allowing Writ of Error, Praecipe for Transcript, Writ of Error, Citation, Return to Writ of Error and Clerk's Certificate to Transcript, in the above-entitled cause, which together constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of $66.50, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said Court this 18th day of June 1910.

[Seal]

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1875. United States Circuit Court of Appeals for the Ninth Circuit. Boise City (a Municipal Corporation of the State of Idaho), (Plaintiff), Plaintiff in Error, vs. The Boise Artesian Hot and Cold Water Company, Limited (a Corporation), (Defendant), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed June 30, 1910.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

BOISE CITY, A Municipal Corporation of the State of Idaho (Plaintiff),
Plaintiff in Error

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), (Defendant),
Defendant in Error

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

RICHARD H. JOHNSON,
Attorney for Defendant in Error.

RICHARD Z. JOHNSON,
Of Counsel.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

1875

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BOISE CITY, a Municipal Corporation of the State of Idaho, (Plaintiff), Plaintiff in Error.

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, (Defendant) Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

F. B. KINYON,
City Attorney of Boise, and
CAVANAH & BLAKE,
Attorneys for the Plaintiff in Error.
Residence Boise, Idaho,

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BOISE CITY, a Municipal Corporation of the State of Idaho, (Plaintiff), Plaintiff in Error.

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, (Defendant) Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Statement of the Case.

This is an action at law brought by Boise City, the plaintiff in error, against The Boise Artesian Hot & Cold Water Company, Limited, a corporation, the defendant in error, to recover the sum of $10,130.00, alleged to be due the city as a license charge for the use and occupancy of its streets and alleys by the defendant in laying and maintaining its water works therein from June 7th, 1906, until April 1, 1909. The cause was originally instituted in the District Court of the Third Judicial District of Idaho and upon petition of defendant removed for trial to the United States Circuit Court for the District of Idaho.

The complaint discloses that the plaintiff is a municipal

corporation within Ada County, Idaho, and that the defendant is a private corporation organized and existing under the laws of the State of West Virginia; that on the 3d day of October, 1889, the plantiff by an ordinance granted to H. B. Eastman and B. M. Eastman, the predecessors in interest of the defendant in and to their water works, a license for an indefinite period to lay and repair water pipes in the streets and alleys of said city, through which water is now and at the times therein stated has been furnished to said city and its inhabitants for profit; that the plaintiff on June 7th, 1906, enacted and approved an ordinance requiring the defendant to pay the plaintiff on the first day of each month a monthly license of $300.00 for the use and occupancy of the streets and alleys of said city by the defendant in the sale and delivery of water to the plaintiff and its inhabitants, and for the privilege granted by said ordinance of October 3, 1889; that demand has been made upon the defendant for the payment of said monthly license, but payment has been refused; that the defendant and its predecessors in interest in and to said water works system, have never at any time paid to the city any compensation for the use and occupancy of said streets and alleys of said city when in operating its said water works system (Tran. pp. 1 to 8).

The defendant answered and admitted all of the allegations of the complaint except as to the ordinance of October 3, 1889, being a license for an indefinite period or that it was indebted to the plaintiff in any sum by reason of the enactment of the ordinances or use of the streets referred to in the complaint. And for a further answer it alleged that on July 10th, 1890, the Mayor and

Council of the plaintiff duly passed an ordinance granting to the Artesian Water & Land Improvement Company, a corporation, and its successors and assigns, the privilege of laying down and maintaining water pipes in the streets and alleys then laid out or thereafter to be laid out and dedicated in Boise City; that said corporation accepted the same and immediately proceeded thereunder and with due diligence to sink artesian wells, construct reservoirs and lay pipes along the streets and alleys of said city and to supply it and its inhabitants with water, and therein expended over $50,000.00; that H. B. Eastman and B. M. Eastman accepted the ordinance of October 3, 1889, and constructed a water system plant and laid their water mains and pipes under and along the streets and alleys of said city and up to the time they conveyed their plant to the defendant they had expended thereon the sum of $20,000.00; that on March 28th, 1891, the Artesian Hot & Cold Water Company, Limited, became the owner by purchase of the rights of said Eastman Brothers and of the Artesian Water & Land Improvement Company in and to said water works system and since said date has supplied water to the plaintiff and its inhabitants and has improved its plant to an expense of $192,000.00; that on August 28th, 1901, the defendant became the owner by purchase of the entire water works system and plant of the Artesian Hot & Cold Water Company, Limited, and since said date has supplied the plaintiff a city of over 25,000 population and its inhabitants with water and therein has expended more than $140,000.00; that the plaintiff and its Mayor and Council have claimed and are still claiming that the defendant is a mere licensee under a license which may

be revoked and annulled at the will of the Council, and the defendant avers that said ordinances when accepted and acted upon by the defendant and its grantors became and are franchises and binding contracts between the plaintiff and defendant; that the defendant during the whole time of its engagement in the business of supplying water has paid its due proportion of taxes, state, county, city and school taxes upon all of its property in said city and has charged and received water rates in accordance with the rate duly established by commissioners appointed under section 2711 of the Revised Statutes of Idaho, and the act of March 9th, 1905, both being now embraced in section 2839 of the Idaho Revised Codes; that the Capital Water Company, a corporation, organized under the laws of Idaho, is now engaged in the business of supplying water to plaintiff and its inhabitants under ordinances granted by plaintiff and the laws of Idaho, but said company is not required to pay any license or tax for the privilege of using said streets (Tran. pp. 19 to 31).

The plaintiff demurred to and moved to strike out certain parts of defendant's answer, for the reason that the facts therein stated do not constitute a defense to the cause of action set forth in the complaint (Tran. pp. 33 to 36). Upon the hearing the demurrer was overruled, and said motion was allowed as to paragraphs eight and fourteen of the answer, and as to the remainder thereof disallowed (Tran. pp. 47 to 57). The Court holding that the ordinances under consideration having been accepted and acted upon by the grantee and its successors creates a franchise for fifty years, which may not be impaired by the imposition of a license tax. Or in other words the

Court held that that part of section 2710 of the Revised Statutes of Idaho, 1887, providing that no contract must be made for a term exceeding fifty years should be read into the ordinance of July 10th, 1890, granting to the Artesian Water & Land Improvement Company the privilege of laying and maintaining water pipes in the streets and alleys of Boise City (Tran. pp. 47 to 56). Thereafter the cause was submitted to the Court upon the pleadings and an agreed statement of facts (Tran. pp. 80 to 88), and upon which the question being raised by objections to the introduction of proof to establish the affirmative allegations of defendant's answer on the ground that the same are incompetent, irrelevant and immaterial and do not constitute a defense to plaintiff's cause of action. The Court rendered its decision in which it held the same as it did in its opinion upon the demurrer and motion, and ordered judgment to be entered in favor of the defendant (Tran. pp. 57-63). It is from this decree that a writ of error is prosecuted in this cause.

Specifications of Error.

The plaintiff in error will rely upon the following errors based upon the assignment of errors heretofore filed (Trans. pp. 92 to 99).

FIRST.

That the Court erred in overruling plaintiff's demurrer to defendant's amended answer.

SECOND.

That the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence, and particularly from ordinances No. 94, set forth in paragraph

three of plaintiff's amended complaint, approved October 3, 1889, and Exhibit "A" attached to defendant's amended answer, approved July 10, 1890, which granted to defendant's predecessors in interest the privilege of laying down, repairing and maintaining water pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claimed the right to the use of the streets and alleys of said Boise City, for the purpose of laying down, repairing and maintaining its water pipes, do not provide the length of time such privilege can be enjoyed.

THIRD.

That the evidence showed that the plaintiff was entitled to recover from the defendant for the reason that it appears from Ordinance No. 678, approved June 7th, 1906, that the defendant is required to pay to plaintiff a monthly license for the use and occupancy of the streets and alleys of Boise City for the sale and delivery of water to the plaintiff and its inhabitants.

FOURTH.

The Court erred in rendering judgment for the defendant for the reason that it appears from Ordinances No. 94, and Exhibit "A" above referred to that defendant had but a mere license to the use of the streets and alleys of Boise City.

ARGUMENT.

The defendant has no franchise or contract right to the use of the streets and alleys of Boise City, as the city has only granted by the ordinances of October 3, 1889, *and July* 10*th*, 1890, *a license, and can require as a further con-*

tinuation of said license the payment of a license fee for the use of its streets and alleys.

We presume that it will not be disputed that unless the defendant has a franchise or contract with the plaintiff for the use of the streets and alleys of plaintiff and is occupying the same for an indefinite period under a mere license from the city, the city can require as a further continuation of said license and use the payment of compensation. This is the crucial question in the case.

We further presume that it will not be controverted that before a person or corporation can acquire the right to occupy and use the highways of a city, such right must be granted by either an act of the legislature or the mayor and council of the city. That whatever rights the defendant has to the use of the streets and alleys of Boise City must come from the ordinances of October 3, 1889, and July 10, 1890. It will be observed from a reading of said ordinances relied upon by the defendant as granting to it the right to the use of the streets and alleys of the city, no term was fixed for the duration of the privilege. That they do not possess any element of a franchise or a contract, but are merely licenses subject to the requirement by the city as a further continuation thereof to the payment of a license fee for the use of the streets and alleys. They certainly do not contract with the defendant or its predecessors in interest that they can occupy and use the streets and alleys of the city for a definite or fixed period. Before entering upon a discussion of this proposition as to whether the defendant under these ordinances has a franchise or contract right to the use of the highways of Boise City for a period of fifty years, or any number of years, we invoke, in the first place, the general rule

that they take nothing in the way of a grant, franchise or contract by intent or implication. They must show by clear and express terms of the grant, franchise or contract that the right or privilege to the use of the streets and alleys is expressly given in said ordinances, for all that is not expressly and especially given is presumed against the company and in favor of the City or State. This rule of law is now elementary.

In the case below the question involved was the validity of a provision against the grant in the charter of a corporation to do certain things, it was said: "The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Northwestern Fertilizing Co. vs. Hyde Park, 93 U. S. 659; 24 L. Ed. 1036.

This rule has been invoked, of course, a great many times and applied to a multitude of charters, ordinances and grants, and we simply give a few of the authorities and references, which may be of interest in the further investigation of this subject.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116; 51 L. Ed. 399.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22; 50 L. Ed. 353.

Sidell vs. Granjean, 111 U. S. 412; 28 L. Ed. 321.

Coosaw Mining Co. vs. South Carolina, 144 U. S. 550; 36 L. Ed. 537.

Pearsall vs. G. M. Ry. Co. 40 L. Ed. 838; 161 U. S. 646.

Clark & Marshall on Corps. Vol 2, pp. 983-985.

Phoenix Inst. Co. vs. State, 40 L. Ed. 660; 161 U. S. 174.

Covington vs. Stanford, 41 L. Ed. 566; 164 U. S. 578.

Hoge vs. Railway Co., 25 L. Ed. 303; 99 U. S. 348.

Bank of Commerce vs. Tenn., 26 L. Ed. 810; 104 U. S. 493.

Syracuse Water Co. vs. City, 116 N. Y. 167.

Viewing the ordinances of October 3, 1889, and July 10, 1890, in the light of these decisions, it is clear that they can avail the defendant nothing in this action in its contention that said ordinances under the laws of the State of Idaho grant a franchise or contract right for the period of fifty years to the use of the streets and alleys of the city, and all that the defendant has under them is a mere license, subject to a requirement by the city to the payment of a license fee for the continuation of the use of the streets and alleys. We repeat that these ordinances are wholly silent upon the subject of the right of the defendant to use and occupy the streets and alleys of the city for any definite period. They simply give defendant the right to *lay and maintain water pipes* in the streets and alleys of the city for no limited time. All other matter relative to the period which defendant can continue occupying and using said streets and alleys, and the payment of a license or compensation to a city for the use of its streets and alleys, are open to future contract and future legislation by the

city. These ordinances do not in any way inhibit or contract against future legislation on the part of the city, and whether the privileges under these ordinances were in the hands of the Eastmans, or their successors, the corporation, they were subject to such obligations, charges, license and duties as the city might reasonably impose. And the duty here imposed by the ordinance of June 7th, 1906, is one which the courts has held proper and reasonable under the conditions which defendant is occupying and using the streets and alleys of the city, there being nothing in the nature of a contract or franchise in these ordinances against the city requiring the payment of a license fee for the continuation of the use of its streets and alleys. The defendant and its predecessors in interest entered upon the occupancy and use of the streets and alleys subject to a license which the city might impose upon it. There is nothing in the ordinances or elsewhere, to prevent the council of the city from requiring the defendant to pay such license. The defendant and its predecessors in interest have seen fit to engage in a business by entering upon the streets and alleys of the city under said ordinances, which do not contain any definite term, or the payment of any compensation to the city for the use of its streets and alleys. They elected to go into such business under such ordinances, and when they did so they placed themselves in a position where they could not complain of the requirement of the city at any time to pay it compensation for the use of its streets and alleys. What we say is that when the water company, for instance, is organized for the purpose of supplying the inhabitants of the city with water and entered upon the streets and alleys of the city under the ordinances, which fail to contain

any element of a contract or franchise exempting it from the payment of a license fee for the use of said streets and alleys, such corporation organized and conducting its business under such conditions is subject to such requirements as is imposed by said ordinance of June 7th, 1906. These ordinances are not contracts which can be enforced in perpetuity by either party. There is no word or clause in them that binds the company to continue to furnish water under them. They are not mutually enforceable. Their continuance is optional, and if the company desired not to pay such license fee required by said ordinance of June 7th, 1906, as a continuance for the use of the streets and alleys it could cease using and occupying the same.

It will be conceded, we presume, that the ordinance of July 10, 1890, is not in substance distinguishable from the Eastmans' ordinance of October 3, 1889, so far as the express language is concerned. It is clear from a reading of these two ordinances that no franchise or contract right has been granted to the defendant and it is necessary for the defendant to look elsewhere in its endeavor to establish a contract or franchise with the city. This question as to whether or not said ordinance of October 3, 1889, granted a franchise or contract to the predecessors in interest of the defendant, was in an action at law between the city and the defendant decided by the Circuit Court of Appeals for the Ninth Circuit. The Court said:

"The plaintiff in error contends that the statute of 1887 confers upon the City of Boise no right to take water free from it or its predecessors, for the reason that they were protected by the franchise given to the Eastmans. There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with

water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the State. * * * But had the Eastmans such a contract with the city as to come within the rule just cited? The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. * * * From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own water works, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

Boise Artesian Hot & Cold Water Company vs. Boise City, 123 Fed. 232.

President, etc., of Colby University vs. Village of Canandaigua, 96 Fed. 449.

It was contended by counsel for defendant in the court below that the case of the President, etc., Colby University vs. the Village of Canandaigua, 96 Fed. 449, cited by Judge Gilbert in the above case does not sustain his opinion. One of the questions presented and decided by the Court in the Village of Canandaigua case was whether or not there was a franchise or license granted by the city. It does appear that the village authorities only permitted the corporation to lay its pipes in the village streets and the question arose as to whether or not the corporation had a franchise which would preclude the village from constructing a water system of its own, without taking by purchase or condemnation the property of the corporation. And the Court held: "No canon of construction is familiar to the Court which transforms plain and unambiguous language permitting an act to be done into a positive command to do the act. So far as the written law is concerned there can be little doubt that villages in this State may build and own their own water supply notwithstanding the fact that private corporations are in the field, provided the village authorities have done nothing more than permit the corporation to lay its pipes in the village streets. In the present instance the village simply granted a naked permission to do this to the company. It was a license, and nothing more."

We take it that the decision of this Court in the case of Boise City Artesian Hot & Cold Water Company vs. Boise City, *supra*, is controlling upon this question as to the language of the ordinances not expressing the elements of a franchise or contract. The decision is based upon sound reason and decisive of this proposition.

It was also contended that sections 2710 and 2712 of the

Revised Statutes of Idaho, 1887, were overlooked by the Court. That the ordinance of July 10th, 1890, was not considered by the Court. That where a license is granted, although for an indefinite period and on the faith of which the grantee has made expenditures, the city is estopped from requiring the grantee to pay for the use of its streets and alleys. Under these contentions we are called upon to consider, first, an analysis of the decision of Judge Gilbert, for the purpose of ascertaining what were the questions presented to the Court in that case. It will be noticed that the bill of the water company in that case disclosed that the city had no right to the use of water free from its pipes for sprinkling purposes, because the ordinance of October 3, 1889, known as the Eastman ordinance, granted to the water company a *franchise*. The answer of the city in that case among other things, made denial of this allegation, thereby presenting to the Court as one of the questions as to whether or not the Eastmans ordinance was a grant or a *franchise*. It is evident from a reading of sections 2710 and 2712 of the Revised Statutes of Idaho, 1887, the Court did not overlook or deem them applicable when in deciding that case, for said section 2710 does not purport to prescribe what a grant or contract made by the city shall contain.

The authorities seem to agree that where no period of time is fixed by the instrument for its duration, which is claimed to be a contract, the same is not binding upon either party thereto and is subject to the payment of reasonable compensation thereunder for the use of the property therein referred to.

"If no time is fixed by the contract for its duration and the contract from its nature is one which might last in-

definitely, either party may at its option terminate such contract."

Page on Contracts, Vol. 3, p. 2110.

Western Union Tel. Co. vs. Pennsylvania Company, 125 Fed. 67.

Jones vs. Newport News and Pb. Co. 65 Fed. 736.

We find that the Supreme Court of the United States has, in the case below, laid down the rule for which we are contending in this case. The question before the Court was as to the right and power of the City of St. Louis to charge the Western Union Telegraph Company for the use and occupancy of its streets and alleys. There were no contractual rights existing between the city and the telegraph company. The company contended that it had a right to the use of the streets of the city under an act of Congress and a general ordinance of the city permitting it to use the streets. The city, after the company had constructed its poles, adopted an ordinance requiring the company to pay it a certain sum for the use of said streets and alleys. The company refused to pay the amount claimed by the city, so suit was instituted in the State court by the city against the company for the recovery of $22,635 for three years' use of its streets. The case was removed to the Federal Court upon application of the company, and the highest court of the land sustained the right of the city to charge for the use of its streets and alleys. We incite the Court's attention to this decision as it settles this question.

City of St. Louis vs. Western Union Telegraph Co. 148 U. S. 92; 37 L. Ed. 380.

That Section 2710 of Revised Statutes of Idaho, 1887, now embraced in Section 2839 of the Idaho Revised Codes, relied upon by the defendant, does not operate to extend the privilege and license referred to in said ordinances of October 3, 1889, and July 10, 1890, for fifty years, or any definite period, as said statute is merely a limitation upon the power to contract, and not a provision of the contract.

We understand that the defendant's main contention is that while the ordinance of July 10th, 1890, is not in substance distinguishable from the ordinance of October 3, 1889, so far as the express language is concerned, still in as much as said ordinance of July 10, 1890, runs to a corporation, the Court in construing it should read into it a clause providing that the privilege granted shall continue for fifty years because of said Section 2710 of the Revised Statutes of Idaho, which reads as follows:

"No corporation formed to supply any city or town must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rate for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

In other words, in the absence of language in the ordinance defining the term, this Statute operates to extend the grant for a maximum period, which could have been legally specified. It is evident from an analysis of this Statute relied upon by the defendant that no provision will be found purporting to define or prescribe what the contract or grant shall contain, but what it shall not con-

tain. It does not operate to extend the privilege and license referred to in said ordinances for fifty years or any definite period as the Statute is a limitation upon the power to contract, and not a provision of the contract.

As was logically said by Judge Dietrich in the case of the Boise Artesian Hot & Cold Water Company vs. Boise City, when in construing this Statute and passing upon the identical question involved in this case, that: "Possibly influenced in a measure by the representations made in the bill that the defendant is disposed to deal unjustly with the plaintiff, and the earnest appeal of counsel for protection against impending confiscation of the plaintiff's property, I have given sympathetic consideration to this contention, hoping that thereby, without destroying the integrity of the law, the relations between the parties might be so defined that neither would be able to do grave injustice to the other, but I have been unable to accept the construction as either a natural or a probable one. The statutory provision relied upon does not purport to define or prescribe what the contract or grant shall contain but what it shall not contain. It is a limitation upon the power to contract, not a provision of the contract. It is not mandatory, but prohibitive. If it provided that in the absence of express agreements the term should be fifty years, then it would naturally take its place in every contract or grant silence as to the term. Suppose that the language were, "No contract or grant must be made for a term less than five years or more than fifty years," what would be the term of a grant like that under consideration? Would there be any more reason to presume the maximum than the minimum? Upon the other hand, by the familiar rule that public grants susceptible of two

constructions must receive the one most favorable to the public, would we not be compelled to adopt the minimum? No substantial distinction can be made between the hypothetical Statute and the provision under consideration; in both cases the maximum is fifty years; in the one the minimum is a grant for five years, in the other a grant revocable at will." Opinion filed June 1st, 1907, but not reported. The case last above referred to which was between the same parties in this action was appealed to the Supreme Court of the United States and the decision of Judge Dietrich was sustained upon the proposition that the bill of complaint in the case did not state facts sufficient to give a court of equity jurisdiction.

It is clear to the mind that the said Section 2710 does not apply to or extend the period of time to fifty years in which the water company can occupy and use the streets and alleys of the city, but if it applies at all, it only provides a limitation upon the city authorities when in contracting with the water company, as this Statute reads: "*No contract or grant must be made for a term exceeding fifty years.*" It certainly can not be contended that the water company could enter upon and use the streets and alleys of the city without first obtaining a franchise or contract from the city under this provision of our statute. Then, if that be true, the city has the undoubted right when in granting such franchise or contract to prescribe the period of time, or limit the life of such franchise or contract, and when in doing so this Statute merely places a limitation upon the power given to the council of the city when in granting such franchise or contract.

In the case below the Court had before it the consideration of a Statute of the State of Ohio, which provided: "That no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal." The Court said: "The general law gives authority to the council to consent to the use of the city's streets for street railroads, and, as we have seen it was not until 1878 that a proviso was added to the effect that no grant or renewal (that is to say, no grant or renewal under Sections 2501 and 2502) should be valid for more than twenty-five years. This proviso is a limitation upon the plenary power, theretofore given by the State to the council, and no more is to be substracted, in consequence of that proviso, from that plenary power thus delegated than its express terms permit."

Cleveland Electric R. Co. vs. City of Cleveland, 137 Fed. 111-129.

Under the charter of Boise City the Legislature of this State has granted to it full control of its streets and alleys. We quote the portions of the charter of the city, with reference to this authority:

"To provide the city with good and wholesome water, and for the erection or construction of such water works and reservoirs within or without the limits of the city as may be necessary or convenient therefor." (Subdivision 9 of Section 5.) And further: "The roads, streets and alleys within said city limits shall be under the exclusive control of said common council, who shall make all needful rules in relation to the improvement, repair, grading, cleaning, etc., of the same, and said city shall not be in-

cluded in any road district in said county." (Section 10, approved January 11, 1866.) And further: "To provide the city with good and wholesome water, by contract or otherwise and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor." (Subdivision 9, Section 5, approved March 12, 1897.) And further: "To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers and the erection of electric, gas and other lights." (Approved March 14, 1901.)

When we invoke the admitted rule, that where a municipality has the power to give or refuse consent to the occupation and use of its streets for any purposes, it may impose terms and conditions, including a time limit; and an acceptance of a grant carries with it all the conditions and limitations upon which it is based.

Chicago Terminal Transfer R. Co. vs. Chicago, 203 Ill. 576; 68 N. E. 99.

Detroit vs. Ft. Wayne & B. I. Co. 95 Mich. 456; 54 N. W. 958.

Alleghany vs. Millville E. & S. R. Co. 159 Pa. 411; 28 Atl. 202.

City of Indianapolis vs. Consumers' Gas. L. Co. 140 Ind. 107; 39 N. E. 433.

The principle which we are contending for as to the power of the city to limit the tenure of a grant or privilege to occupy its streets is clearly recognized in the case below when in construing a Statute limiting the city to a period of twenty years in granting a privilege to the use of its streets, the Court said: "The city being a source of the

grant, not merely a consentor to it, the terms and duration of the grant to that end were prerogatives of the city, delegated by the State, and the gas company was powerless, equally with any individual to exact terms or privileges. It could only accept or refuse such terms as were tendered. * * * Thus, in fixing by this ordinance the tenure during which the grantee was permitted to occupy the streets with its pipes and served the inhabitants with natural gas, it was within the power of the city to limit the tenure, either to a definite number of years, or to terminate after a given period at the option of the city, as was in effect provided by Section 18."

In the concurring opinion of Judge Grosscup, it is said: "The sole right of the company to enter upon the streets of Indianapolis, was under a grant from the City of Indianapolis. Under the laws of Indiana, the city is not simply a consentor—the city is the source of the grant; and being the source of the grant has the right to impose upon the grant, as to tenure, as well as to other terms and conditions, just such limitations as it deemed wise."

City of Indianapolis vs. Consumers' Gas Trust Co. 144 Fed. 640-44-48.

Sullivan vs. Bailey (Mich.) 83 N. W. 996.

City of Houston vs. Houston City Street Ry. Co. 19 S. W. 127.

It should be borne in mind that there is a distinction between grants conferred by the State and obtained by organization under the State law, and those contractional grants not given by the State but which come from the local authorities having the right to grant the use of a city highway. The principle of law is too well settled in this

country as to now be open for discussion. The cases holding that the life of a franchise not containing a fixed period granted by the Legislature is the period fixed for the life of the corporation, are not grants given by municipalities.

"The argument that, because the State had imposed no limitation upon the duration of the corporate franchises of this company, theretofore the term for which it held its street grants was likewise intended to be unlimited, is illogical. It loses sight of the distinction between those franchises conferred by the State and obtained by organization under the State law and those property or contractual franchises not granted by the State, and not inherent in the corporation as such, but which come from the local authority having the right to grant the right to occupy a public highway."

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296-308.

Blair vs. City of Chicago, 201 U. S. 400; 50 L. Ed. 801.

That said Section 2839 of the Idaho Revised Codes is a general law of the State of Idaho, and has no application to the plaintiff Boise City, which is now and ever since January 11, 1866, has been incorporated under a special charter granted to it by the Legislature.

It will be observed from the answer of the defendant and its position heretofore taken in this case upon the plaintiff's demurrer thereto, that the defendant relies solely upon the application of Section 2710 of the Revised Statutes of Idaho, 1887, now embraced in Section 2839 of the Idaho Revised Codes, in its contention that Boise City had granted to the Artesian Water and Land

Improvement Company, and its successors in interest, a franchise for a period of fifty years. At the time of the adoption of said ordinance of July 10th, 1890, the plaintiff Boise City was, and now is, existing under a special charter granted to it by the Legislature on January 11, 1866, and in said charter it is provided: "The mayor and common council shall have full power and authority within Boise City * * * to provide the city with good and wholesome water; and for the erection and construction of such water works and reservoirs within or without the limits of the city as may be necessary or convenient therefor * * * ." City charter of Boise City, Sec. 5, Sub. 9. It is further provided in Section 10 of said charter that "The roads, streets and alleys within said city limits shall be under the exclusive control of said common council, who shall make all needful rules in relation to the improvement, repair, grading and cleaning, etc., of the same, and said city shall not be included in any road district in said county."

It is further provided that Section 32 of said charter, "To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers, and the erection of electric, gas and other lights."

Thus it will be seen from the above provisions of the special charter of the plaintiff Boise City, full power and authority is granted by the Legislature to it to provide the city with good and wholesome water. Therefore, the city is the source of any grant or franchise, and being the source of such grants or franchises we look to the provisions of its special charter in determining what period of time a right is granted in considering an ordinance like the one in question.

Under plaintiff's contention that said Section 2710 of the Revised Statutes of Idaho, 1887, now embraced in Section 2839 of the Idaho Revised Codes, is a general law of the State and has no application to the plaintiff Boise City, nor does it amend the special charter of the plaintiff, suggests two inquiries.

First. What is the settled law of the State of Idaho?

Second. If it be as claimed by the plaintiff, is it binding upon the Federal Courts?

The answer to the first inquiry is clear. The question as to whether or not a general law of the State relating to the power and authority of Boise City to issue and contract for the sale of local improvement bonds under a general law, was presented to the Supreme Court of Idaho in the case of Boise City National Bank vs. Boise City, 100 Pac. 93. In that case the question before the Court was as to the application of the general law of the State to the plaintiff Boise City, and the Court after reviewing and considering a provision of the special charter of Boise City and a general law of the State laid down the following rule:

"We have in this State cities which were organized under and granted certain powers, by special charters, enacted by the Legislature prior to the adoption of our State Constitution. Sec. 2 of Art. XXI of our State Constitution continued such special charters in force after the Constitution went into effect. We have other cities that have been organized under the general municipal corporation law of the State. Section 1, Art. XXII, of the Constitution, provides, among other things, that the Legislature shall enact general laws for the incorporation and classification of cities and town and that cities and towns

theretofore incorporated under special charters may become organized under such general laws whenever a majority of the electors at a general election shall so determine under such provisions of law as may be enacted by the Legislature. Boise City has never become organized under the general laws of the State, but has continued to exist and do business under the powers granted it by its special charter. * * * "Under the provisions of Section 1, Article 12, of the Constitution, it is provided that cities and towns theretofore incorporated may become organized under the general laws whenever the majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the Legislature. This clearly indicates the cities incorporated by special charter do not come under the general laws of the State until the majority of the electors of such city at a general election for that purpose shall so determine. We think it clear that the powers of Boise City in regard to creating indebtedness and paying the same must be determined by the provisions of its charter, and not by the provisions of said bonding act of 1905, which is a general law applicable to all cities incorporated under the general law for incorporating towns and cities. * * * If the Legislature has the power under the Constitution of Idaho to make the general bonding act of 1905 relating to internal governmental affairs of cities and villages apply to Boise City by merely inserting in that act a section to that effect, then the Legislature may make the general act governing cities, towns and villages throughout the State, or any part thereof, apply in the same manner and without a consent of the majority of the electors as is required by Section 1, Article 12, of the Constitution. If the Legisla-

ture could do that it would annul said provision of the Constitution entirely. To permit the Legislature to amend special charters of cities in matters of local government by general laws would be contrary both to the letter and spirit of the Constitution. This Court held in McDonald vs. Doust, 11 Idaho, 14; 81 Pac. 60; 69 L. R. A. 220, that acts inconsistent with the spirit of the Constitution are as much prohibited as are acts specifically enumerated and forbidden therein. City of Lexington vs. Thompson, 113 Ky. 540; 68 S. W. 477; 57 L. R. A. 775; 101 Am. St. 361.

The special charter of Boise City is recognized and continued in force by the Constitution, and a method of amending it by special laws is clearly contemplated by the Constitution. All the limitations upon the Legislature in regard to special legislation are found in Section 19, Article III, of the Constitution. Butler vs. City of Lewiston, 11 Idaho, 393; 83 Pac. 234. We have no provision in our Constitution such as is found in the Constitution of some other States, to the effect that no special laws shall be passed where general laws can be made applicable. It followed, therefore, that these special charters may be amended by special laws to meet the requirements of growing cities, but can not be amended by general laws. The act of February 24, 1905, is an example of how general legislation could be made to effect cities under special charters without the attention of the people of the city or even the members of the Legislature ever being called to that fact, because no reference to its application to such cities is mentioned in the title of the bill. There is nothing in the title of this act which could indicate that it is proposed to affect or amend the charter of Boise City. The title of the act of February 24, 1905, in-

dicates that it is a general law providing for the issuance of bonds of incorporated cities, towns and villages organized under the general incorporating laws of the State. The title is general, while in Section 10 of said act it is provided that said act shall be construed as additional and confirmed authority to cities under special charters. That part of said act is void because it is not embraced in the title, and, if it were embraced in the title, it could not affect Boise City, as above shown. We therefore hold, under the various provisions of our Constitution above quoted, that the Legislature can not amend the special charter of Boise City by a general law. Such amendment can only be made by special laws.

"The judgment is therefore reversed, and the case remanded, with instructions to enter judgment in favor of the appellant as prayed for in the complaint. Costs are awarded to the appellant."

Boise City National Bank vs. Boise City, 15 Idaho, 792; 100 Pac. 93.

The above doctrine has never been departed from by the Supreme Court of Idaho and is now the settled law of the State.

The Court will further observe that the defendant in its answer avers that the ordinance of July 10, 1890, to the Artesian Water and Land Improvement Company, a corporation, and which the defendant claims that the 50-year statute should be read into, was passed by the mayor and council of the plaintiff, "*under authority contained in its charter and the general laws of Idaho.*" The contention of the defendant then being that authority for the adoption of said ordinance of July 10, 1890, was given both under

the *charter* of Boise City and the *general laws of Idaho.*

Judge Gilbert, in his opinion on the trial of this cause, refers to the case of Boise City vs. Artesian Hot & Cold Water Company, 4 Idaho, 351, as a controlling decision on the question under consideration on the theory that it expressly holds that the chapter of the Idaho Statutes relating to water corporations is applicable to Boise City. With all deference to the opinion of Judge Gilbert we take the view that the opinion in that case does not go to the extent that he claims. That was a suit brought by Boise City to restrain the defendant company from cutting off water furnished to the city for fire purposes. There was no allegation in the complaint that the defendant company was authorized either by ordinance or contract to furnish water to Boise City and its inhabitants and the demurrer to the complaint was sustained on that ground. At the very opening of the opinion the Court uses this language: "The date given as the time when this corporation was organized and commenced business was at a time when the statute (Idaho Revised Statutes, Sections 2710-2712) was in force and therefore the said corporation is *subject to the provisions thereof.*" The Court in its opinion no where holds that Boise City is subject to the provisions of said sections, nor is the question whether Boise City is a municipal corporation organized under the general laws of the State or under special charter considered. The only thing decided by the Court is that any corporation organized for the purpose of furnishing water to a city and its inhabitants must get its authority to do so either by ordinance or contract. In other words, it was held that the Statute meant that no corporation organized for the purpose of furnishing water to a city and its inhabitants in

Idaho could exercise its powers in so doing without first securing authority either by ordinance or contract. It was not intended as a curtailment or limitation of the powers of the city in dealing with the water company, but it was intended as an obligation upon all companies organized for the purpose of furnishing water to cities and their inhabitants. The statute relates solely to the powers, duties and obligations of water companies formed for the purpose mentioned and has no reference whatever to the powers and duties of cities organized either under a general or special law. While we contend that a general law passed by the Legislature has no application to Boise City, we do not by any means go to the extent of claiming that the Legislature has not the power to pass a law providing what shall and what shall not be the powers and obligations of a corporation organized for the purpose of supplying water to cities and their inhabitants or for any other purpose.

One thing must be conceded and that is the sections of the statute here referred to are general in their application. Conceding for the moment that the Supreme Court of Idaho in the case of Boise City vs. Artesian Hot & Cold Water Company, *supra*, held that these sections of the Statute were applicable to Boise City, although the question as to whether Boise City was incorporated under the general laws of the State or under a special act was not considered. We contend that the case of Boise City vs. Artesian Hot & Cold Water Company, *supra*, was overruled by the case of Boise City National Bank vs. Boise, *supra*, for the reason that that is the latest utterance of the Supreme Court of Idaho, and the question as to applicability of a general law of the State to a city operat-

ing under a special charter was there directly involved, and it was there held that in matters of purely local concern a general law of the State had no application.

The question then arises whether the control of the streets is such a matter of local concern as to fall within the rule laid down in that decision. We take the view that the control of the streets of Boise City is a municipal as distinguished from a governmental function.

"All functions of a municipal corporation not governmental are strictly municipal. They are sometimes called private just as governmental are called public. Under this class of functions are included, in most jurisdictions, the proper care of streets and alleys, parks and other public places, etc. Logically, all those are strictly municipal functions which specifically and peculiarly promote the comfort, convenience and happiness of the citizens of the municipality rather than the welfare of the general public."

Cyc. of Law and Procedure, Vol. 28, pp. 268-269.

"There is an essential difference between cases where the matter is a general governmental one and cases where the matter is so peculiarly one of municipal control and local interest as streets."

Elliot on Streets and Roads, 426.

"The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all the matters that are of specific municipal concern, and certainly the streets are as much of *special* and *local* concern as anything connected with the town or city can well be."

Elliot on Streets and Roads, Sec. 417.

The control of the streets being exclusively in the city it seems there can be no doubt that the city would have the absolute right to say under what conditions and for what length of time a franchise to use the streets could be granted. Being a matter of purely local concern, under the decision of the Supreme Court of Idaho in the case of Boise City National Bank vs. Boise City, *supra*, no general law of the State could have any possible application to a franchise granted by Boise City and certainly could not be read into any franchise granted by the city.

The mere fact that the defendant has made expenditures in the enlargement of its system and is furnishing water to the city and its inhabitants for profit in accordance with the rates fixed by a commission and is paying the taxes levied upon its property under the general laws of the State, or because the Capital Water Company, who has a contract with the city for a fixed period is not required to pay a license fee, do not become a part of or to be read into said ordinances of October 3, 1889, *and July* 10, 1890, *or estops the city in the absence of a franchise or contract from requiring the defendant to pay compensation for the use of its streets, as these matters are equitable defenses and can not be interposed in an action at law in the Federal Courts.*

This is an action at law, but the defendant in its answer seeks to establish an equitable defense to the action. The allegations of the defendant's answer to the effect that it has expended large sums of money on the faith of the ordinances, referred to, that the city has acquiesced in the use of its streets, that its property has been assessed for state, county, city and school taxes, and in the same manner as other property, and that it has each and every year

paid to the proper tax collector the amount of all taxes assessed against its property and that the plaintiff city has granted to another water company, known as the Capital Water Company, a franchise for the purpose of supplying the plaintiff and its inhabitants with water, and that the Capital Water Company is now, and for a long time past has been, engaged in the business of supplying water to the plaintiff and its inhabitants and using and occupying the plaintiff's streets and alleys for such purposes, without being required to pay the plaintiff any license or tax whatever for such privilege and that there are numerous other individuals, associations and corporations using plaintiff's streets and alleys for the purposes of supplying the plaintiff and its inhabitants with electric lights, gas, streets railways, telegraph and telephone purposes, without being required to pay the plaintiff any license or tax whatever, are purely matters of equitable consideration and can not be plead in an action at law in the Federal Courts as a defense.

It will be noticed from defendant's answer that its predecessor in interest voluntarily went to the city and asked for the privilege and license granted by said ordinances, and that the city only, by the term thereof, granted permission to lay water pipes in its streets and alleys for an indefinite period. There was no contract made between them, nor has the defendant or its predecessors in interest ever at any time paid the city in any way for the use of its streets and alleys, which they have been using free of charge for a long time, and have and now claim the right to compensation for water furnished to the city for certain municipal purposes. It makes the request that it should receive compensation for the water furnished to the city

and at the same time be permitted to use the streets and alleys free of charge.

This plea of defendant's that if it is required to pay for the use of the streets and alleys of the city under said ordinance of June 7, 1906, would bring hardship to it, although it appears to be furnishing water at a profit to the inhabitants of a city of 25,000 and also charging the city for water, is sufficiently answered in the cases cited below, in which the correct doctrine is stated that, "But such siderations can not control the determination of the rights of the parties."

Hamilton Gas & Coke Co. vs. City of Hamilton, 146 U. S. 252; 36 L. Ed. 961-8.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22; 50 L. Ed. 353.

Curtis vs. Whitney, 13 Wall. 68-70; 20 L. Ed. 513.

President, Etc. of Colby University vs. Village of Canandiagua, *supra.*

An equitable defense in an action at law can not be interposed in the Federal Courts.

It is a well established rule that the defendant in an action at law in the Federal Courts can not set up a defense that is an equitable one.

Miss. Mills vs. Cohn, 150 U. S. 202; 37 L. Ed. 1052.

Northern Pac. Ry. Co. vs. Paine, 119 U. S. 561; 30 L. Ed. 513.

Scott vs. Armstrong, 146 U. S. 439; 36 L. Ed. 1059.

Gravenberg vs. Law, 100 Fed. 1; C. C. A. 240.

"It is obvious and always has been held that a United States Circuit Court can not in the trial of an action at law exercise the powers of a court of equity."

Security Trust Company vs. Black River Nat. Bank, 187 U. S. 211; 47 L. Ed. 147.

The evidence fails to disclose that the defendant or its predecessors in interest ever asked permission from the city to assign or transfer to the defendant, a foreign corporation, any privilege or license granted by said ordinances.

We contend that the Artesian Hot and Cold Water Company of Idaho, being a mere creature of the law, had no authority without consent of the city to transfer any privilege or license it may have had to the defendant, a West Virginia corporation, and thus authorize a stranger to the city to come into the city and exercise this privilege or license; that the defendant company has not plead sufficient facts to enable it to exercise this privilege or license. It having failed, as heretofore stated in this brief, to disclose by its answer and the evidence any contract, and that its pretended purchase of the Idaho company's privilege and license was void.

Pullman Co. vs. Transportation Co. 139 U. S. 1; 35 L. Ed. 55.

Thomas vs. West Jersey R. R. Co. 101 U. S. 71; 25 L. Ed. 951.

Penn. Ry. Co. vs. St. Louis Ry. Co. 118 U. S. 290; 30 L. Ed. 83.

Snell vs. City of Chicago, 152 U. S. 191; 38 L. Ed. 408.

O. R. N. Co. vs. O. R. Co. 130 U. S. 1; 32 L. Ed. 837.

Gibbs vs. Gas Co. 130 U. S. 396; 32 L. Ed. 979.

The authorities relied upon by defendant in the court below concerning the questions involved in this case are clearly distinguishable upon the facts, as it will be noticed

that they are cases where the Courts had before them the consideration of contracts or ordinances possessing all the elements of a contract for a definite period. Our attention was especially called to the Walla Walla case, 172 U. S. 1, by defendant as settling the question of its having a franchise. The Court will discover upon an examination of that case that there was an express agreement on the part of the city of Walla Walla not to build water works of its own during a period of twenty-five years, the terms of the contract. No such ordinance or question was presented in that case as is in the case at bar.

In presenting the questions involved in this case we have endeavored to draw the distinction recognized by the authorities between a corporation having an express contract or franchise for a definite period of time and possessing all the elements of a contract with a municipality for the use of its streets, and where a corporation having merely permission to lay water pipes in the streets for an indefinite time which is a license subject to the payment to the city of compensation for a continuation of the privilege thereby granted. It is manifest that there is a clear distinction in this regard, and also between grants conferred directly by the Legislature and those which come from the local authorities of a municipality.

For the reasons given we insist that the judgment rendered herein should be reversed.

Respectfully submitted,

F. B. KINYON,

City Attorney of Boise, and

CAVANAH & BLAKE,

Attorneys for the Plaintiff in Error.

Residence Boise, Idaho,

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

BOISE CITY, A Municipal Corporation of the State of Idaho (Plaintiff),
Plaintiff in Error

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), (Defendant),
Defendant in Error

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

STATEMENT OF CASE.

This is an action at law originally commenced by Boise City in the State court against the defendant water company to collect over ten thousand dollars claimed to be due under a city ordinance which seeks to impose a tax upon defendant for using the streets of the city. The defendant company is organized under the laws of West Virginia and

removed the case to the Circuit Court of the United States on the ground of diverse citizenship. The defendant thereupon filed an answer to the complaint, a demurrer to the answer was interposed by plaintiff, a hearing on the demurrer was had before Judge Gilbert and the demurrer was overruled. The main questions involved in the case were decided in favor of the defendant in the opinion overruling the demurrer. The case afterwards came up for final hearing upon an agreed stipulation of facts and some new questions of law raised by the city. Judgment was rendered in favor of the defendant on the final hearing and the city brought the case to this Court by writ of error.

The principal question in the case involves the construction of the grant of July 10th, 1890, from the city to the Artesian Water and Land Improvement Company, a corporation, its successors and assigns of "the privilege of laying down and maintaining water pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated in Boise City." (Trans. pp. 22, 31-32.)

The Artesian Water and Land Improvement Company was a corporation organized under Chapter V of Title IV of the Idaho Civil Code, the material sections of which are hereinafter quoted in full, and that company accepted the above ordinance, constructed a water works system and the defendant in error is successor in interest of that company. (Trans. p. 22, par. VII of answer, which is admitted by the stipulation on p. 39, par. 3.)

The contention of the city is that because no time limit or period of duration for this grant was placed therein by the Common Council, it is merely a revocable license.

Chapter V of Title IV of the Civil Code under which the Artesian Water and Land Improvement Company was organized, provides:

"Sec. 2710. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.

"Sec. 2711. All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of person, upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by commissioners to be selected as follows:

"Two by the city or town authorities, or when there are no city or town authorities, by the Board of Commissioners of the County, and two by the water company; and in case a majority cannot agree to the valuation, the four commissioners must choose a fifth commissioner; if they cannot agree upon a fifth, then the probate judge of the county must appoint such fifth person. The decision of the majority of the commissioners must determine the rates to be charged for water for one year, and until new rates are established. The Board of County Commissioners or the proper city or town authorities may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."

This section was amended by Act of March 9th, 1905, and the part relating to furnishing water free of charge was stricken out, and was also amended by the Act of March 16th, 1907, 9 Ses. 556, to apply to "all *persons, companies,* or corporations supplying water to towns and cities."

"Sec. 2712. Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable direction of the Board of County Commissioners, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways and alleys in any town or city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city or through or into any part thereof.'

Other statutory and charter provisions which may have a bearing on the case, are as follows:

Franchises May Be Sold Like Other Property.

"For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property." (Rev. Stat., Sec. 2642.)

The charter of Boise City, approved January 11, 1866, provides as follows:

"Sec. 3. For the government of said city there shall be elected biennially a Mayor, a Common Council consisting of five members, a Collector, a Treasurer and a Justice of the Peace for said City * * *." (Special and Local Laws, 1887, Section 130.)

This was amended by Act of March 14th, 1901, as follows:

"The power and authority given to the municipal corporation of Boise City by this Act, is vested in the Mayor and Common Council, and in the Departments authorized by their act, and by their successors in office, to be exercised in the manner hereinafter prescribed." (Rev. Ord. Boise City, page 4, Sec. 5.)

Section 5, Subd. 9, is as follows:

> "The Mayor and Common Council shall have full power and authority within Boise City * * * to provide the city with good and wholesome water; and for the erection or construction of such water works and reservoirs within or without the limits of the city, as may be necessary or convenient therefor * * *."

Section 10 provides:

> "The roads, streets and alleys within said city limits shall be under the exclusive control of said Common Council, who shall make all needful rules in relation to the improvements, repair, grading, cleaning, etc., of the same, and said city shall not be included in any road district in said county * * *."

Section 40 provides:

> "This Act shall be deemed a public Act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all courts and places."

Section 2653 of the Revised Statutes of 1887; Sec. 2792 of the Revised Codes of 1908 provides that a foreign corporation which has complied with the law, by performing the acts set forth in the first allegation of defendant's answer, which are admitted by the stipulation to have been done by the defendant,

> "shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain and shall be subject to the laws of the State applicable to like domestic corporations."

ARGUMENT.

The case relied upon by the city to sustain its contention as to the grants being revocable at the will of the city

council, is *Boise Artesian Hot and Cold Water Co. v. Boise City,* 123 Fed. 232; 59 C. C. A. 236, in which this Court had under consideration another ordinance granting rights to Eastman Brothers and their successors in interest, to use the streets.

An entirely different question was presented in that case, viz: whether the water company was required to furnish water under Sec. 2711, for fire purposes free of charge. The grant to the Artesian Water and Land Improvement Company was not before the court for consideration in that case, but the only ordinance considered was the one to individuals, which could not be construed to come within the provisions of the sections of the Code, quoted above, relating to water and canal corporations. This distinction is clearly pointed out in the opinion of the court below in overruling the demurrer to the answer (Trans. pp. 50-56) and we can add nothing to that very complete and conclusive discussion of the question. Our contention is that the conclusion reached by the learned Judge is absolutely correct and that it is unnecessary to discuss the Eastman ordinance or the language used by this court in the former case in construing that ordinance.

If any authority were considered necessary to the effect that the section of the statute relating to the duration of the grant to the corporation, in force when the grant of July 10th, 1890, was made, should enter into and form a part of a contract, we would refer to the rule in

Walker v. Whitehead, 16 Wall. 314, 317,

that laws existing at the time and place of making a contract, and where it is to be performed whenever they affect its validity, construction, discharge and enforcement, enter into and form part of the contract and no subsequent legislation could alter them, and that they are parts of the obli-

gation which is guaranteed by the constitution against impairment.

To the same effect are

Von Hoffman v. City of Quincy, 4 Wall. 550;
Tomlinson v. Jessup, 15 Wall. 457;
Edwards v. Kearzey, 96 U. S. 595, 601;
Brine v. Insurance Co., 96 U. S. 627, 634, 637;
Pritchard v. Norton, 106 *U. S.* 124.

These cases hold that such statutes are as much a part of the contract as if incorporated into them and that the parties must be presumed to have acted with reference to the statutes in force governing the question.

Applying that principle to this case, if the ordinance of July 10th, 1890, contained the language of the statute, to-wit: this contract or grant shall not be "for a term exceeding fifty years", no one would contend that the parties contemplated that it might be revoked at the will of the city after it had been acted upon in good faith by the company. It has never been contended by the city that there is any other theory upon which the taxing ordinance in controversy can be sustained unless it be that the grants to the defendant's predecessors in interest are revocable licenses. In other words, it has been conceded by the city that if the defendant possesses any contract rights under those grants, the ordinance in controversy would amount to an impairment thereof. We deem it unnecessary therefore to make more than the briefest reference to a few of the many cases which hold that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon the condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract

protected by the Constitution of the United States against impairment.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9;

and cases cited in the opinion.

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 577-78;

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S., 65, 80-82;

Vicksburg v. Vicksburg Waterworks Co., 202 U. S., 453;

Vicksburg v. Vicksburg Waterworks Co., 202 U. S., 496.

The same principle with reference to grants of right to use of streets for railroad tracks.

Cleveland v. Cleveland City Ry. Co., 194 U. S., 517;

Northern Pac. Railway Co. v. Duluth, 208 U. S., 583, 591.

And the following cases which hold that grants of this character although silent as to the term, are nevertheless, within the protection of the Constitution of the United States.

National Waterworks Co. v. Kansas City, 65 Fed. 691;

Des Moines City Railway Co. v. City of Des Moines, 151 Fed. 854;

Baltimore Trust & Guarantee Co. v. Mayor of Baltimore, 64 Fed. 153;

City of New Orleans v. Telephone and Telegraph Co., 40. La. An. 41, 3 So. 533,

where the same question was raised as in this case and a tax was attempted to be levied for the use by the company of the streets, on the theory that the company has merely a revocable license to use the streets because there was no time limit contained in the grants.

Old Colony Trust Co. v. Wichita, 123 Fed. 762;

Suburban Electric Light & Power Co. v. East Orange, 41 At. 865;

City of Los Angeles v. The Los Angeles City Water Co., 61 Cal. 65,

holding that a license imposed upon all persons or corporations not municipal, vending water for domestic purposes, monthly rates or licenses, was void citing *Stein v. Mayor of Mobile,* 49 Ala. 362.

See also:

Arcata v. Arcata & Mad. River R. Co., 92 Cal. 639, 644;

John Savage v. City of Salem, 23 Ore. 381; 31 Pac. 832; 37 Am. St., 688; 24 L. R. A., 787;

Milhau v. Sharp, 27 N. Y. 611;

People v. Sturtevant, 9 N. Y. 263;

David v. Mayor, 14 N. Y. 506.

Mayor v. Railway Co., 32 N. Y. 261;

Railroad Co. v. Kerr, 72 N. Y. 330;

People v. O'Brien, 111 N. Y. 1.

Re Brooklyn, 143 N. Y. 596;

People ex. rel. Flatbush Gas. Co. v. Coler, 103 N. Y. Supp. 590.

cited in the opinion of the court below.

N. W. Tel. Ex. v. Minneapolis, 81 Minn. 140;

Borough of Shamokin v. Ry. Co., 178 Pa. St. 120;

Providence Gas Company v. Thurber, 2 R. I., 15;

Rutland Elec. Light Co. v. Marble City Elec. Light Co. 65 Vermont 377; 26 At. 653;

Monongahela Nav. Co. v. United States, 148 U. S. 312, 344;

Wyandotte Elec. Light Co. v. Wyandotte, 124 Mich. 43, 47, 82 N. W., 821.

In *Joyce on Franchises,* Sec. 313, p. 493, the author in discussing this question says:

> "If no term is specified but the laws of the state place a limitation upon the duration of the grant, then during such period there can be no impairment of the contract obligation unless the right is reserved to the city to nullify the grant."

Doctrine of Estoppel as Against City.

For sixteen years until the passage of the ordinance in controversy, the city has always recognized the right of defendant and its grantors, to lay down and maintain their water pipes in the streets and alleys of the city and has permitted them to erect and maintain an expensive plant and has accepted the benefits accruing to the public by reason of the furnishing by them of pure and healthful water, and the city had dealt with the water company in the matter of fixing rates as late as a year previous to the passage of the ordinance in question.

In the fixing of these rates the commission figured a net return to the water company of six per cent on the valuation of its plant at that time and did not take into consid-

eration any such tax as the one in question. (Trans. p. 40, par. 8 of stipulation.)

In a number of the cases cited above the doctrine of estoppel was applied against the municipality, under similar conditions. See

National Waterworks Co. v. Kansas City, supra;

Monongahela Nav. Co. v. United States, supra;

City of New Orleans v. Telephone & Telegraph Co., supra.

In *Omaha Water Co. v. City of Omaha,* 156 Fed. 922, similar in many respects to this case, the Circuit Court of Appeals of the Eighth Circuit held that:

> "a municipal corporation in respect of its purely business relations as distinguished from those that are governmental is held to the same standard of just dealing that the law prescribes for private individuals."

In *Union Depot Co. v. St. Louis,* 76 Mo. 393, 396, it was held that where a city had granted a franchise to a Union Depot Company to use, and occupy streets and the company had erected costly buildings thereon, the city cannot afterwards object. The court said:

> "When a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals."

The distinction between a city acting in a governmental and in a proprietary or quasi-private capacity is clearly pointed out in So. Bell Tel. Co. v. Mobile, 162 Fed. 531-32, and is held in the latter case to be governed by the same rules that govern a private individual or corporation, citing numerous cases.

Intention of the Parties.

This, we submit, is a proper question to be considered and we refer to the opinion of the Court on page 55 of the Transcript, and to the language of the Supreme Court in *Detroit v. Detroit Citizens St. Ry. Co.,* 184 U. S., on pages 384 and 398, where the question is fully discussed.

Application of Sec. 2710 to Boise City.

This question, which was presented by the city for the first time on the final hearing, is so completely answered in the opinion of the court (Trans. pp. 57-63), that little remains to be said on the subject.

The contention of the city that the case of *Boise City National Bank v. Boise City,* 15 Ida. 792, makes the general corporation laws of Idaho including Sec. 2710, limiting grants of this kind to 50 years, inapplicable within Boise City, because that city is operating under a special charter, is set at rest by the decision of the Supreme Court of Idaho in *City of Boise v. Artesian Hot & Cold Water Co.,* 4 Ida. 351, 39 Pac. 562, which was decided in 1895, when Boise City was operating under the special charter as at present. The city brought the action to compel the water company to furnish water to the city free of charge for fire purposes as required by Sec. 2711 of the Code. The court held that the complaint of the city must set forth the ordinances or contracts under which the water company was supplying water to the city as required by Sec. 2710, thus recognizing the application of that section to Boise City. The city itself in commencing that suit insisted upon the application of Sec. 2711, which is a part of the same chapter, because its contention that the water company must furnish water for fire purposes free was based entirely upon that section. In appointing the commission to fix the rates to be charged by defendant for water, the city also acted under Sec. 2711.

Moreover, an examination of the case of *Boise City Natl. Bank v. Boise City,* clearly shows that the court did not hold that the general corporation laws of the State have no application in cities governed by a special charter, but only that the general laws relating to the government of cities and villages not under special charter, have no application in purely municipal matters to questions covered by the provisions of the special charter. In that particular case it had to do with the manner of paying for sewer construction. The general laws governing cities and villages permitted the payment to be made in ten annual installments. The special charter of Boise covered fully the matter of sewer construction and provided for a different method of payment, and the court held that the general law did not apply.

It is clear that the chapters of the Code relating to private corporations do not deal primarily with the government of cities and towns or municipal affairs and it is only incidentally that they affect Boise City and they relate to matters not dealt with in the special charter. It would follow that the decision relied upon can have no bearing upon this case.

We find on page 34 of brief of plaintiff in error, this statement:

> *"The evidence fails to disclose that the defendant or its predecessors in interest ever asked permission from the city to assign or transfer to the defendant, a foreign corporation, any privilege, or license granted by said ordinances."*

When the right to lay water pipes in Boise City was granted to the Artesian Water and Land Improvement Company the privilege was granted to the latter company, its successors or assigns. (Trans. pp. 66-7, par. IV.) Since

the granting clause to successors or assigns is clear, the contention of plaintiff in error must be predicated upon the basis that since the assignee is a foreign corporation it suffers a disability which would not attach to a domestic corporation.

The laws of Idaho provide (Rev. Codes Sec. 2792):

> "That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations."

This section expressly clothes the defendant in error with all the rights an dprivileges of domestic corporations. Full compliance by defendant in error with laws of Idaho, relating to foreign corporations is admitted by plaintiff in error (allegation 1 Trans. p. 19, stipulated as true, Trans. p. 80).

Our position is that defendant in error has acquired this consent and that its right to exercise the assignment of the franchise in question can not be disputed. It has been endowed with this power by the voluntary act of the State of Idaho.

Our contention is in reality supported by counsel for plaintiff in error, for when their argument is reduced to its last analysis, it discloses their position to be that defendant in error took no rights by assignment, since, while a franchise or contract would be assignable, a license is not. (Brief of Pl. in Error, p. 35.)

This begs the real question at issue, which is, Has defendant in error a franchise or merely a revocable license? The weakness of the position of opposing counsel is that to support their contention they assume it as a working hypothesis.

In the cases cited by plaintiff in error the grants were not made directly to the successors or assigns and the court held that a corporation cannot, without the consent of the legislature, transfer its franchise to another corporation and "abnegate the performance of the duties to the public," imposed upon it as the consideration of the grant.

Obviously this rule has no application where the grant is expressly made to the assigns of the grantee, who continue to perform the duties to the public under the supervision and control of the granting power, precisely the same as before the transfer was made. The city has exercised the right to control this defendant and has joined in fixing maximum rates to be charged, as alleged in the answer and admitted by the stipulation, and there is no evidence whatever that the city or its inhabitants are in any manner affected through the abnegation of any duties growing out of the grant.

The right to transfer a franchise under conditions like those in case at bar has been sustained by the Supreme Court of Idaho in the case of

Evans v. Kroutinger (*supra*);

Cases directly in point are:

Old Colony Trust Co. v. City of Wichita, 123 Fed. 762, affirmed 132 Fed. 641;

San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075;

Los Angeles v. Los Angeles City Water Co., 177 U. S. 575;

People v. Stanford, 77 Cal. 371;

Com. Elec. Light & Power Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

In the case of *Evans v. Kroutinger* (*supra*) the court in the syllabi, said:

> "1. A ferry franchise may be voluntarily transferred the same as any other incorporeal hereditament.
>
> "2. The franchise granting power retains the same control over the franchise in the hands of the assignee as it does while it is still exercised by the original grantee.
>
> "3. The franchise granting power alone can question the right of the assignee of such franchise to exercise its rights and privileges."

At page 770 of 123 Fed. in the case of *Old Colony Trust Company v. City of Wichita*, the court said:

> "The effect of this deed was to tranfer the benefits of this ordinance to the Missouri corporation, and the United Telephone Company had the right to transfer it because the ordinance granted the franchise to the 'United Telephone Company, its successors or assigns', and the fact that the title of the ordiance does not specify that the franchise is not granted to the 'successors and assigns' of said telephone company, in the opinion of the court does not restrict the provisions of the ordinance to the United Telephone Company alone. That omission in the title (if it can be called an omission) could not possibly mislead any one. No one could read two lines of the first section of the ordinance without discovering that the ordinance was granted to the United Telephone Company, 'its successors and assigns.' "

An able discussion of the question is also found in

American Loan & Trust Co. v. General Electric Company, (N. H.) 51 At. 660, 661-664.

In *Mayor etc of Knoxville v. Africa,* 77 Fed. 501, 23 C. C. A. 252, the Circuit Court of Appeals of the Sixth Circuit, speaking through Judge Lurton, on page 505 of 77 Fed. said:

> "A right of way upon a public street, whether granted by act of the legislature, or ordinance of a city council or in any other valid mode is an easement and as such is a property right capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Detroit v. Detroit Citizens St. Ry. Co.,* 22 U. S. App. 570, 12 C. C. A. 365 and 64 Fed. 628, *Louisville Trust & Banking Co. v. City of Cincinnati* (decided at present term) 76 Fed. 296."

See also:

> *Michigan Tel. Co. v. City of St. Joseph,* 121 Mich. 502, 80 N. W. 383,

where the court upholds the right to transfer the franchise to use streets and quotes with approval the last clause from Crosw. Electricity, Sec. 158, as follows:

> "If the grant is in terms to X, his successors and assigns or similar language it is assignable."

Incorporation is a status created by the law of the chartering State and the corporation has the nature and the powers which that State confers and all matters concerned with its existence and its nature should be determined by the law of that State (Taney, C. J., in *Bank of Augusta v. Earle,* 13 P. 519). Defendant in error was organized for the purpose of supplying the plaintiff in error with water, and to take, purchase, acquire, hold, operate and maintain the rights and properties of water companies and to acquire, own, use, operate and maintain all properties, franchises, etc., of

its predecessor in interest. (See first allegation of answer, Trans. pp. 19-20, which is admitted by stipulation, Trans. p. 80.)

As to the denial (Pltf. in error's brief, p. 34) of the right of the Artesian Hot and Cold Water Company of Idaho, "being a mere creature of the law," to transfer any privilege to defendant in error, we think counsel have not distinguished between the assignment of the franchise to be a corporation and the franchise to use the corporate property for the purposes for which the corporation was organized. We admit the franchise to be a corporation is not assignable. But the right of a corporation to assign any franchise other than its franchise of being a corporation is clear. The franchise of the Artesian Hot and Cold Water Company could as well be exercised by natural persons. Corporate existence is not essential to its use and enjoyment. There was nothing in its nature inconsistent with its being assignable. It could not be held that when a mortgage on the company and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises.

We realize that as to all rights and liabilities of a corporation created as a result of acting in a foreign State, it is to be dealt with entirely according to the law of the State in which it acts. But the defendant in error is asking no special privilege or immunity denied domestic corporations since the grant by the city to the Artesian Water and Land Improvement Company was to its successors or assigns. Defendant in error having complied with all the requirements demanded of foreign corporations by Idaho, took a vaild assignment of this grant which we contend is a franchise not to be impaired by the imposition of a license tax.

Question Must Be Raised by Quo Warranto.

Yet, for the purposes of argument, let us assume that defendant in error has usurped some privilege, license or franchise, and that the transfer of the same was illegal, there must first be an adjudication of forfeiture against the defendant in error in a proceeding by the County Attorney in accordance with the following statute, Sec. 4612 Rev. Codes of Idaho and of the Rev. Stat. of 1887, which provides for quo warranto proceedings and which reads:

> "An action may be brought in the name of the people of the State against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this State, without authority of law. Such action shall be brought by the prosecuting attorney of the proper county, when the office or franchise relates to a county, precinct, or city, and when such office or franchise relates to the State, by the Attorney General; and it shall be the duty of the proper officer, upon proper showing, to bring such action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same."

That the franchise granting power alone can raise the right of the assignee of such a franchise to exercise its rights and privileges was decided by the Supreme Court of Idaho in the case of

Evans v. Kroutinger, 9 Ida. 153, 72 Pac. 882;

To the same effect:

National Bank v. Matthews, 98 U. S. 621, 628;

People ex rel Sabichi v. Los Angeles Elec. Ry. Co., 91 Cal. 338;

Milwaukee Electric Ry. and Lt. Co., v. City of Milwaukee, (*Wis.*) 69 N. W. 794.

We deem a further citation of authorities unnecessary to show that if this defendant in error has usurped title to any rights, easements or franchises, it is a matter not to be adjudicated in an action by the city to collect a license tax.

For the foregoing reasons we respectfully submit that the judgment of the court below should be affirmed.

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